

## The Central Law Journal.

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Recent decisions of English courts seem to have caused something like consternation amongst bankers who have large dealings with stockbrokers. These decisions, succinctly stated, amount to this, that bankers cannot with safety to themselves make advances to stockbrokers on the deposit of securities, payable to bearer, unless some sort of inquiry is made, and the stock certificate itself is carefully examined, with a view to ascertain whether the securities are actually the property of the persons obtaining the advances. And the fact that the exact extent of the inquiry has not been defined, renders it extremely difficult, if not impossible, to say what research on the part of the bank into the title of the borrower will be deemed sufficient. The facts, in the principal one of these cases were that one Little employed a firm of stockbrokers in the city of London to purchase on his account certain bonds, which were, on the face of them, payable to bearer, and which admittedly passed from hand to hand. These bonds he paid for sooner or later, and left with the brokers for safe custody, though apparently with a view to speculation. The brokers, however, deposited the bonds with the bank to secure advances to themselves, and subsequently, but without redeeming them, became defaulters on the stock exchange, and were adjudicated bankrupts. Under these circumstances Little claimed the bonds, and the bank refused to give them up, and Mr. Justice Kekewich has held that the refusal was not justifiable. The bank, it should be added, knew that the persons making the deposit were stockbrokers, and they never inquired whether the bonds were the brokers' own property. Mr. Justice Kekewich's decision seems to involve the proposition, that the mere fact that a person depositing securities, to secure an advance from a bank, is a stockbroker, is sufficient to put the bank on inquiry whether the securities are the would-be borrower's own property. He grounded his decision, upon the ruling of the house of

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lords in the Earl of Sheffield's Case. But that case is distinguishable from the Little Case, for the very simple reason, that it is a decision on a question of fact—aye or no had the bank notice?

The doctrine of the Little Case would hardly be sustained in this country, and, in our opinion, is not good law, unless accompanied by proof that there is a custom among stockbrokers to pledge other people's securities, which would be difficult to make. The mere fact that a man, depositing securities payable to bearer, is a stockbroker is not enough to fix the depositor with notice that he is or may be dealing with property not his own, and is not sufficient to put the depositor on a futile inquiry as to who is the real owner. Even the law will not assume, or expect bankers to assume, that all stockbrokers are fraudulent or, we will say, addicted to the bad habit of pawning other people's scrip; and the stockbroker when really fraudulent is far too sharp a fellow to be balked, in his desire to indulge such a habit, by any inquiry as to the real ownership of the property disposed of.

The other case, of which mention is made above, is commented on in a recent issue of the *American Banker*, and is a late decision of the house of lords. Certain bankers at London made advances to a broker upon a pledge of New York Central Railway certificates, which were registered in the name of their deceased owner and indorsed by his executors in blank. The custom of Wall street, we believe, is to treat certificates indorsed in blank, as though they are bank notes and the absolute property of the holder, who has the power of writing in his own name, if he chooses, and having the certificates so registered. When the broker failed, the bankers sought to set up a lien for the amount of their advances upon the shares. But the house of lords, in an opinion which expressly asserted that the law of England and of the United States is identical upon the point, declared that the usage of neither the New York nor the London stock exchange could prevail over the law which required the bank making the advances to read what was printed and written on the certificate and to be governed by its language. The English money dealers pledged the property of their

clients for their own debts, while the lenders parted with their money without observing that the collateral was registered in the deceased owner's name, and indorsed in the executor's. The house of lords declared that they must pay for their carelessness, by losing their advances. There was no hardships, because they had notice of the irregularity, if they had chosen to read it, and, as for the impossibility of doing business if they stopped to read—why, their lordships did not believe it, and anyway it was legally necessary to do business honestly, however slowly.

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We are pleased to see our view of Hancock v. Yaden, as to the validity of the Indiana act regulating the payment of employees by corporations, indorsed by the *Albany Law Journal*, whose opinions of the law are, in point of value, second only to its poetic accomplishments.—*Central Law Journal*. "Call you that backing your friends?"—*Albany Law Journal*.

We cannot see wherein it is not a "backing" of our friends. Having the desire to compliment our worthy contemporary, we felt that one, which ignored the poetic talent, manifest in every issue, and for which it is becoming justly celebrated, would hardly be appreciated. At the same time, we thought it proper to pay a tribute to its opinions of the law, especially as we were so handsomely indorsed in the one under consideration, and appreciating the fact that it is still an able law journal in spite of its brilliant poetic effusions.

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#### NOTES OF RECENT DECISIONS.

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**CONSTITUTIONAL LAW — LICENSE TAX — RAILROAD COMPANY — INTERSTATE COMMERCE.** —A question of constitutional law, involving the right of a State to impose license tax on railroad agents, came before the United States Supreme Court in *McCall v. People*, 10 S. C. Rep. 881. There it was held that an order of the board of supervisors of the city and county of San Francisco, which imposes a license tax of \$25 per quarter on every railroad agency, is a regulation of interstate commerce, in so far as it applies to an agent who solicits passenger traffic in San Francisco over a railroad operated between Chicago and New York, but who sells no

tickets, and neither receives nor pays out any money or other valuable consideration on account thereof. The fact that the road represented by the agent is wholly outside the State of California does not justify the order imposing a tax on its traffic. The limitation on the power of a State to tax interstate commerce extends to all such commerce, though it may not actually pass through its territory. The agent's business, being carried on to assist, or with the purpose to assist, the traffic of his road, is within the protection of the commerce clause of the federal constitution (Const. U. S. art. 1, § 8, cl. 3), though it may not be essential to such traffic. Chief Justice Fuller and Mr. Justices Gray and Brewer dissented. Mr. Justice Lamar says:

In *county of Mobile v. Kimball*, 102 U. S. 691, 702, this court defined interstate commerce in the following language: "Commerce with foreign countries and among the States, strictly considered consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities." Pomeroy, in his work on Constitutional Law (section 378), referring to the signification of the word "commerce," says: "It includes the fact of intercourse and of traffic, and the subject-matter of intercourse and traffic. The fact of intercourse and traffic, again, embraces all the means, instruments, and places by and in which intercourse and traffic are carried on, and, further still, comprehends the act of carrying them on at these places, and by and with these means. The subject-matter of intercourse or traffic may be either things, goods, chattels, merchandise, or persons. All these may therefore be regulated."

Tested by these principles and definitions, what was the business or occupation carried on by the plaintiff in error on which the tax in question was imposed? It is agreed by both parties that his business was that of soliciting passengers to travel over the railroad which he represents as an agent. It is admitted that the travel which it was his business to solicit is not from one place to another within the State of California. His business, therefore, as a railroad agent, had no connection, direct or indirect, with any domestic commerce between two or more places within the State. His employment was limited exclusively to inducing persons in the State of California to travel from that State into and through other States, to the city of New York. To what, then, does his agency relate, except to interstate transportation of persons? Is not that as much an agency of interstate commerce as if he were engaged in soliciting and securing the transportation of freight from San Francisco to New York city over that line of railroad? If the business of the New York, Lake Erie & Western Railroad Company, in carrying passengers by rail between Chicago and New York and intermediate points, in both directions, is interstate commerce, as much so as is the carrying of freight, it follows that the soliciting of passengers to travel over that route was a part of the business of securing the passenger traffic of the company. The object and effect of his soliciting agency were to swell the volume of the

business of the road. It was one of the "means" by which the company sought to increase, and doubtless did increase, its interstate passenger traffic. It was not incidentally or remotely connected with the business of the road, but was a direct method of increasing that business. The tax upon it therefore was, according to the principles established by the decisions of this court, a tax upon a means or an occupation of carrying on interstate commerce, pure and simple.

In Robins v. Shelby Taxing Dist., 120 U. S. 489, 7 Sup. Ct. Rep. 592, the taxing district of Shelby county, Tenn., which included the city of Memphis, acting under the authority of a statute of that State, attempted to impose a license tax upon a "drummer" for soliciting, within that district, the sale of goods for a firm in Cincinnati which he represented; but this court decided that such a soliciting of business constituted a part of interstate commerce, and that the statute of Tennessee imposing a tax upon such business was in conflict with the commerce clause of the constitution of the United States, and was therefore void. A like decision was rendered in Leloup v. Port of Mobile, 127 U. S. 640, 8 Sup. Ct. Rep. 1380; and in Asher v. Texas, 128 U. S. 129, 9 Sup. Ct. Rep. 1 both of these decisions were carefully considered, and the principle was affirmed. In Stoutenburgh v. Henwick, 129 U. S. 141, 9 Sup. Ct. Rep. 256, the same question came before the court, and the principle governing the cases to which we have referred was again carefully considered and affirmed. See, also, Pickard v. Car Co., 117 U. S. 34, 6 S. C. Rep. 635; Fargo v. Michigan, 121 U. S. 230, 7 Sup. Ct. Rep. 857; and the recent cases of Leisy v. Hardin, *ante*, 681, and Lyng v. State of Michigan.

We might conclude our observations on the case with the above remarks, but we deem it proper to notice some of the points raised by the defendant in error, and which were relied upon by the court below to control its decision sustaining the validity of the aforesaid order. It is argued that the New York, Lake Erie & Western Railroad Company is a foreign corporation operating between Chicago and New York city, wholly outside of and distinct from California; and it is very earnestly contended that the business of soliciting passengers in California for such a road cannot be interstate commerce, as it has not for its end the introduction of anything into the State. We do not think that fact, even as stated, is material in this case. The argument is based upon the assumption that the provision in the constitution of the United States relating to commerce among the States applies as a limitation of power only to those States through which such commerce would pass, and that any other State can impose any tax it may deem proper upon such commerce. To state such a proposition is to refute it; for if the clause in question prohibits a State from taxing interstate commerce as it passes through its own territory, *a fortiori* the prohibition will extend to such commerce when it does not pass through its territory. The argument entirely overlooks the fact that in this case the object was to send passenger traffic out of California, into and through the other States traversed by the road for which the plaintiff in error was soliciting patronage.

It is further said that the soliciting of passengers in California for a railroad running from Chicago to New York, if connected with interstate commerce at all, is so very remotely connected with it that the hindrance to the business of the plaintiff in error caused by the

tax could not directly affect the commerce of the road, because his business was not essential to such commerce. The reply to this proposition is that the essentiality of the business of the plaintiff in error to the commerce of the road he represented is not the test as to whether that business was a part of interstate commerce. It may readily be admitted, without prejudicing his defense, that the road would continue to carry passengers between Chicago and New York even if the agent had been prohibited altogether from pursuing his business in California. The test is, was this business a part of the commerce of the road? Did it assist, or was it carried on with the purpose to assist, in increasing the amount of passenger traffic on the road? If it did, the power to tax it involves the lessening of the commerce of the road to an extent commensurate with the amount of business done by the agent. The court below relied mainly upon Railroad Co. v. Com., 114 Pa. St. 256, 6 Atl. Rep. 45; Mining Co. v. Pennsylvania, 125 U. S. 181, 8 Sup. Ct. Rep. 737; and Smith v. Alabama, 124 U. S. 465; 8 Sup. Ct. Rep. 564,—to support its judgment. But we are of opinion that neither of the cases in this court sustains that position. The other case we have disposed of in a separate opinion, reversing the judgment of the court below. Mining Co. v. Pennsylvania manifestly is not an authority in favor of the position of the court below, but rather the reverse. In that case a company incorporated under the laws of Colorado, for the purpose of doing a general mining and milling business in that State, had an office in Philadelphia, "for the use of its officers, stockholders, agents, and employees." The State of Pennsylvania, through her proper officers, assessed a tax against the corporation for "office license," which the company resisted, on the ground that the act under which the assessment was levied was in conflict with the "commerce clause" of the constitution of the United States, in that it was an attempt to tax interstate commerce, as such. The Pennsylvania courts affirmed the validity of the assessment, and, a writ of error having been sued out, the case was brought here for review. This court held that the State legislation in question did not infringe upon the commercial clause of the constitution, because it imposed no prohibition upon the transportation into the State of the products of the corporation, or upon their sale in the State, but simply exacted a license tax from the corporation for its office in the commonwealth; and went on to say: "The exactation of a license fee to enable the corporation to have an office for that purpose within the commonwealth is clearly within the competency of its legislature. It was decided long ago, and the doctrine has been often affirmed since, that a corporation created by one State cannot, with some exceptions, to which we shall presently refer, do business in another State without the latter's consent, express or implied;" quoting at some length from Paul v. Virginia, 8 Wall. 168, to sustain the conclusion there reached. But the court further remarked that "a qualification of this doctrine was expressed in Pensacola Tel. Co. v. Western U. Tel. Co. 96 U. S. 1, 12, so far as it applies to corporations engaged in commerce under the authority or with the permission of congress;" and in conclusion said: "The only limitation upon this power of the State to exclude a foreign corporation from doing business within its limits, or hiring officers for that purpose, or to exact conditions for allowing the corporation to do business or hire officers there, arises where the corporation is in the employ of the federal government, or where its business is strictly com-

merce, interstate or foreign. The control of such commerce, being in the federal government, is not to be restricted by State authority." The reference to *Pensacola Tel. Co. v. Western U. Tel. Co.*, clearly indicates that the court did not intend to lay down any rule recognizing the power of a State to interfere in any manner with interstate commerce. The latter case was one in which the legislature of Florida had granted to the Pensacola Company the exclusive right of establishing and maintaining telegraph lines in two counties in that State, and this court held that such legislation was in conflict with the act of congress of July 24, 1866, granting to any telegraph company the right "to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by act of congress, and over, under, or across the navigable streams or waters of the United States," etc. This court held such State legislation unconstitutional, as interfering with interstate commerce, and in its opinion announced no doctrine not in harmony with the principles of the later decisions to which we have referred. *Smith v. Alabama* was a case in which an act of the State legislature imposing a license upon any locomotive engineer operating or running any engine or train of cars on any railroad in that State was resisted by an engineer of the Mobile & Ohio Railroad Company, who ran an engine drawing passenger coaches on that road from Mobile, in that State, to Corinth, in Mississippi, on the ground that the statute of the State was an attempt to regulate interstate commerce, and was therefore repugnant to the commercial clause of the constitution of the United States. We held, however, that the statute in question was not in its nature a regulation of commerce; that so far as it affected commercial transactions among the States, its effect was so indirect, incidental, and remote as not to burden or impede such commerce, and that it was not, therefore, in conflict with the constitution of the United States or any law of congress. It having been thus ascertained that the legislation of the State of Alabama did not impose any burden or tax upon interstate commerce, there is nothing to be found in the opinion in that case that is not in harmony with the doctrines we have asserted in this case. That opinion quoted at length from *Sherlock v. Alling*, 93 U. S. 99, 102, 103, where it was expressly held that "the States cannot by legislation place burdens upon commerce with foreign nations or among the several States. The decisions go to that extent, and their soundness is not questioned. But, upon an examination of the cases in which they were rendered, it will be found that the legislation adjudged invalid imposed a tax upon some instrument or subject of commerce, or exacted a license fee from parties engaged in commercial pursuits, or created an impediment to the free navigation of some public waters, or prescribed conditions in accordance with which commerce in particular articles or between particular places was required to be conducted. In all the cases the legislation condemned operated directly upon commerce, either by way of tax upon its business, license upon its pursuit in particular channels, or conditions for carrying it on."

**VETERINARY SURGEON—NEGLIGENCE.**—In *Barney v. Pinkham*, 45 N. W. Rep. 694, the Supreme Court of Nebraska hold that a

veterinary surgeon, in the absence of a special contract, engages to use such reasonable skill, diligence and attention as may be ordinarily expected of persons in that profession. He does not undertake to use the highest degree of skill, nor an extraordinary amount of diligence. In other words, the care and diligence required are such as a careful and trustworthy man would be expected to exercise. *Maxwell, J.*, says:

A veterinary surgeon impliedly engages and is bound to use, in the performance of his duties in his employment, such reasonable skill, diligence, and attention as may be ordinarily expected of persons in that profession. He does not contract to use the highest degree of skill, nor an extraordinary amount of diligence, but to exercise a reasonable degree of knowledge, diligence, and attention. *Craig v. Chambers*, 17 Ohio St. 253; *Nelson v. Harrington*, 72 Wis. 591, 40 N. W. Rep. 228; *Leighton v. Sargent*, 27 N. H. 460; *Holtzman v. Hoy*, 118 Ill. 534, 8 N. E. Rep. 832; *Carpenter v. Blake*, 60 Barb. 488; *McNevins v. Lowe*, 40 Ill. 209; *Wood v. Clapp*, 4 Sneed, 65. No doubt an action will lie against a veterinary surgeon for gross ignorance and want of skill as well as for negligence. *Seare v. Prentice*, 8 East, 348. But there is no charge of this kind, unless the word "incompetent" includes such charge which, it does not necessarily, as the incompetency may arise from physical defects, as impaired vision or other like cause. When it is sought to charge one employed in a profession requiring skill with ignorance or want of due care, it must be done by allegations stating that fact, and it should not be left to mere inference to be deduced from the use of vague and indefinite terms. The implied contract of the plaintiff in error was not to cure, but to possess, and apply in his treatment of the case, such reasonable skill and diligence as are ordinarily exercised in his profession; or, as stated by the Supreme Court of Ohio in *Craig v. Chambers*: "By accepting the retainer, he bound himself to bring the performance of his undertaking a reasonable degree of care and skill; but, in the absence of a special agreement to do so, he did not undertake to perform a cure. Nor can negligence be implied from the failure of the defendant to effect a cure. Such failure may have arisen from the age and constitution of the patient, or from the inherent difficulties growing out of the nature of the injury, which may have been such as to baffle the highest degree of skill and care." The care and diligence required are such as, under the circumstances, a careful and trustworthy man would be expected to exercise.

**EMPLOYMENT AGENCIES — REGULATION — LICENSE.**—In *Moore v. City of Minneapolis*, 45 N. W. Rep. 719, it was held that the business of employment agencies is a proper subject of police regulation by a State. *Dickinson, J.*, said:

The action is for the recovery of the sum of \$150 paid by the plaintiffs to the city of Minneapolis to procure a license to conduct an employment agency within the city for the procuring of employment for male persons. The ground upon which repayment is sought is that the city ordinance requiring licenses

from the city for such purposes was valid, for reasons to be hereafter considered, and that the plaintiffs paid the fee for such license under threats of arrest and prosecution if a license were not procured, the payment being claimed to have thus been made under duress. The business was a proper subject of police regulation and control. The nature of the business, and the character of those with whom the business is likely to be conducted, in point of intelligence, experience and capacity for self-protection from fraudulent practices, are such that it might well be deemed necessary by the legislature, as a matter of proper police regulation, that by means of a license system, dishonest and disreputable persons should, so far as possible, be excluded from the right to engage in the business, and that the conduct of the business be so regulated as to afford means for the detection of fraudulent practices and of redress for wrongs done. The propriety of police regulation seems apparent when it is considered that by means of such agencies ignorant and credulous persons might easily be defrauded of their money under a mere pretense of employment to be afforded them in a distant part of the State, so that the fraud would not be discovered until the victim should have gone so far away as to be unlikely to trouble the fraudulent agent by prosecution. Again such business might be resorted to as a means of bringing girls into places unfit for their employment or presence.

#### THE PROGRESS OF EQUITY IN FOLLOWING TRUST FUNDS.

##### I.

Within the past decade much discussion has taken place in the solution of the difficulties connected with tracing and identifying moneys impressed with a trust when the same have become mingled or blended with private or other moneys of the person or corporation standing in the fiduciary position.

Many of the cases arose out of dealings with banks or bankers, and of this class a large part are concerned with the disposition of the proceeds of commercial paper transmitted to banks of deposit for collection. And in determining this last division of cases the question has mainly been whether, under given circumstances, the relation between banker and customer was that of debtor and creditor or principal and agent.

Great impetus was given to [a correct and satisfactory treatment of the principles involved in the great variety of cases which have recently come before the courts, upon this head, by the decision in the English case of *Knatchbull v. Hallett*<sup>1</sup> in 1879, overruling *Ex parte Dale & Co.*,<sup>2</sup> and with it the early

case of *Whitecomb v. Jacob*,<sup>3</sup> as well as kindred subsequent adjudications, in so far as the same presented obstacles in the way of following trust money into a mixed fund consisting of the former and money held in another capacity. Since many of the precedents in England which have a bearing on the question are cited in the first-named case, the present investigation will begin with a statement of what was there decided.

In that case<sup>4</sup> Jessel, M. R.,<sup>5</sup> in speaking generally of the rules of courts of equity, says: "It must not be forgotten that the rules of courts of equity are not, like the rules of the common law, supposed to have been established from time immemorial. It is perfectly well known that they have been established from time to time—altered, improved and refined from time to time. In many cases we know the names of the chancellors who first invented them. No doubt they were invented for the purpose of securing the better administration of justice, but still they were invented. Take such things as these: the separate use of a married woman, the restraint on alienation, the modern rule against perpetuities, and the rules of equitable waste. We can name the chancellors who first invented them, and state the date when they were first introduced into equity jurisprudence, and therefore, in cases of this kind, the older precedents in equity are of very little value. The doctrines are progressive, refined and improved; and if we want to know what the rules of equity are, we must look, of course, rather to the more modern, than the more ancient cases."

The case in which this succinct and lucid statement as to the progressive character of the doctrines of equity was made was deter-

<sup>3</sup> 1 Salk. 161 (1711).

<sup>4</sup> 13 Ch. D. 710 (1879.) This case has been referred to in the following more recent English cases: *Ex parte Hardcastle, Re Mawson*, 44 Law T. (N. S.) 523 (1881), from which it was distinguished on the facts to which it was held to be inapplicable; *New Zealand, etc. Co. v. Watson*, 7 Q. B. D., 374, 383 (1881); *Mildred v. Maspons*, 8 App. Cas. 876 (1883); *Murray v. Scott*, 9 Id. 534 (1884); *In re Great Berlin Steamboat Co.*, 26 Ch. D. 616 (1884); *Carson v. Sloane*, 18 L. R. (Ir.) Ch. D. 139, 147 (1884).

<sup>5</sup> As to the estimation in which the memory of this learned judge, Sir George Jessel, now dead, is held in England, see the eulogistic remarks regarding him made by the present Lord Chancellor and Lord Selborne upon the recent unveiling of a memorial bust of him in the English courts of justice: 22 Am. L. Rev. 257.

<sup>1</sup> 13 Ch. D. 696.

<sup>2</sup> 11 Id. 772 (1879).

mined in the court of appeal. The action was originally brought by a general creditor for the administration of the estate of one Hallett, deceased. The case came on upon demands by several persons against money in the hands of Hallett's bankers. One of the claimants, a Mrs. Cotterill, had placed certain securities for money in Hallett's hands, for investment. He was her solicitor and invested the securities in Russian bonds which he deposited at his bankers. These bonds were sold at Hallett's direction, without Mrs. Cotterill's authority, by the bankers, and the proceeds placed to his credit in his account with the bankers, which came to be a mixed account consisting of those proceeds and money belonging to him, individually. Another claim was that of certain trustees under a marriage settlement of Hallett, the funds of which had been misappropriated by him, and also mixed with his general account at his bankers. The court allowed both claims against the balance in the bankers' hands in priority to the general creditors of Hallett, and in adjusting this balance, money which Hallett had drawn for his private purposes was charged against his individual deposits. The court decided that, if money held by a person in a fiduciary character, though not as a trustee, has been paid by him to his account at his bankers, the person for whom he held the money can follow it, and has a charge on the balance in the banker's hands, although it was mixed with his own moneys. It was also determined that the rule in Clayton's case,<sup>6</sup> attributing the first drawings out of the first payments in, does not apply; and that the drawer in this case being a person standing in a fiduciary position must be taken to have drawn out his own money in preference to the trust money.

Mr. Justice Fry had, in the court below,<sup>7</sup> when delivering his judgment allowing Mrs. Cotterill's claim, referred to the case, *Ex parte Dale & Co.*,<sup>8</sup> in which he had come to a contrary conclusion under similar circumstances, and which he sought to distinguish from the main precedent against his opinion, *Pennell v. Deffell*,<sup>9</sup> upon authority of Taylor

v. Phumer,<sup>10</sup> *Whitecomb v. Jacob*<sup>11</sup> and other ancient cases. He says, in referring in *Ex parte Dale & Co.* to *Taylor v. Plumer*: "That decision introduces the distinction from the cases of *Whitecomb v. Jacob*, which I referred to, and shows that money may be treated as ear-marked when it is physically separated from other moneys." And he decided *Ex parte Dale & Co.* in accordance with an expression in *Whitecomb v. Jacob*, that where a factor had mingled the proceeds of goods belonging to his principal with his own moneys, the principal could not follow his money, because money had no earmark and could therefore not be followed after it had been blended with other money. In *Ex parte Dale & Co.*,<sup>12</sup> a banking company were employed as agents to collect money and to remit it to their employers, and the bank received the money in cash, placed it with the other cash of the bank, and informed their employers that the money had been remitted and then before the money was actually remitted the bank went into liquidation. Mr. Justice Fry held that the money collected was part of the general assets of the bank, and that the employers of the bank were not entitled to be paid in priority to other creditors.

In *Knatchbull v. Hallett*, the master of the rolls dissented from this ruling of Mr. Justice Fry in the most forcible language, though with the greatest deference to his great abilities as a master of equity. I have referred (meaning *Whitecomb v. Jacob* and the other ancient cases) and from which I do not feel myself justified upon any reasoning of my own in departing."

In criticising this language and dissenting from the ruling of Mr. Justice Fry, the master of the rolls made the comments with which this article was begun as well as other clear and able statements as to the value and proper use of authorities,<sup>13</sup> and continued: "So he (Mr. Justice Fry) here decided the case wrongly and against his own opinion and against the case of *Pennell v. Deppell* in deference to a long line of authorities. That being so, I feel bound to examine his supposed long line of authorities, which are not

<sup>6</sup> 1 Mer. 572 (1816). This rule had been followed in *Pennell v. Deffell*, 4 De G. M. & G. 372 (1859).

<sup>7</sup> 18 Ch. D. 703 (1879).

<sup>8</sup> 11 Ch. D. 772, 777, 778 (1879).

<sup>9</sup> 4 De G. M. & G. 372.

<sup>10</sup> 3 M. & S. 562, 575 (1814).

<sup>11</sup> 1 Salk. 161 (1711).

<sup>12</sup> 11 Ch. D. 772.

<sup>13</sup> 13 Ch. D. 712.

very numerous, and show that not one of them lends any support whatever to the doctrine or principle which he thinks is established by them."

"The supposed long line of authorities" includes Whitecomb v. Jacob, which is no longer law on the point in question. This case was decided by Lord Hardwicke in the year 1711. The master of the rolls reviews the case in Knatchbull v. Hallett<sup>14</sup> in this way: "Now, let us see, therefore, what Whitecomb v. Jacob decides. It decides that the equity as to following the proceeds attaches to the case of a factor as well as to the case of *cestui que trust* and trustee; but it decides, secondly, that you could not follow money because it had no ear-mark. The first part is good law at the present day; the second is not. Whether it was good law or not at the time of Salkeld it is immaterial to consider. It is very doubtful whether equity had got quite so far at that date as since, and therefore I will not say it was not; but it is not so now. The first part is good law and the second part is not, and therefore Whitecomb v. Jacob is no authority on the second point on which it was decided, and so Mr. Justice Fry said.<sup>15</sup> Then Mr. Justice Fry proceeds in his judgment to say: "Now, with the single exception that it appears to have been held subsequently that money may be so far earmarked that it may be followed if it has been kept separate, that case appears always held to be an authority;<sup>16</sup> that is to say, with the single exception that the sole ground for the decision has been overruled it is to be an authority! Did ever any one hear anything, if I may say so, so extraordinary as such a comment on an old case? The sole ground of that decision was that, although as a general rule you may follow the proceeds as against the factor, as you may against the trustee in equity, yet, because money has no ear-mark, you cannot follow it. That is overruled, and still the judge holds it to be an authority. It appears to me no authority at all, the sole ground of the decision having been long since overruled by some of the authorities which Mr. Justice Fry cites."

He then continues his review of "the sup-

posed long line of authorities," denouncing or commenting upon, explaining or criticising them in a delightful and masterly manner.

The cases next reviewed were only Ryall v. Rolle<sup>17</sup> decided in 1749, by Mr. Justice Burnet, *Ex parte Dumas*,<sup>18</sup> decided in 1754 by Lord Hardwicke, Scott v. Surman,<sup>19</sup> decided in 1742-3 by Mr. Justice Willis, *Ex parte Sayers*,<sup>20</sup> decided in 1800 by Lord Thurlow, and Taylor v. Plumer,<sup>20a</sup> decided in 1814 by Lord Ellenborough; and these comprise the whole of the line of authorities cited by Mr. Justice Fry in *Ex parte Dale & Co.* Of these Ryall v. Rolle and *Ex parte Dumas* were pronounced to be overruled and not law now upon the point in controversy; another, Scott v. Surman is criticised as expressing a mere *dictum* upon that point; and the last Taylor v. Plumer, is said to have been decided by Lord Ellenborough correctly as to the point that in following money impressed with a trust, it makes no difference whether the same was "ear-marked" or not; that the same may be followed through whatever change it may have gone and that "the right of following only ceases when the means of ascertainment fail."

Says the master of the rolls: "That is correct. Now, there comes a point which is not correct, but which I am afraid only ceases to be correct because Lord Ellenborough's knowledge of the rule of equity was not quite commensurate with his knowledge of the common law, "which is the case when the subject is turned into money and mixed and confounded in a general mass of the same description." He was not aware of the rule of equity which gave you a charge—that if you lent £1,000 of your own and £1,000 trust money in a bond for £2,000, or on a mortgage for £2,000, or on a promissory note for £2,000, equity could follow it, and create a charge; but he gives that not as law—the law is that it only fails when the means of ascertainment fail—he gives it as a case in which the means of ascertainment fail, not being aware of this refinement of equity by which the means of ascertainment still remain. With the exception of that one fact, which is rather a fact than a statement

<sup>14</sup> *Id.* 713.

<sup>15</sup> 13 Ch. D. 703.

<sup>16</sup> Salkeld says the same in his note to the case, 1 Salk. 161 (1711).

<sup>17</sup> 1 Atk. 165.

<sup>18</sup> *Id.* 232.

<sup>19</sup> Willes, 400.

<sup>20</sup> 5 Ves. 169.

<sup>20a</sup> 3 M. & S. 562.

of law, the rest of the judgment is in my opinion admirable. It goes on: "The difficulty which arises in such a case is a difficulty of fact, and not of law, and the *dictum* that money has no ear-mark must be understood in the same way, *i. e.*, as predicated only of an undivided and undistinguishable mass of current money." There, again, as I say, he did not know that equity would have followed the money, even if put into a bag or into an undistinguishable mass, by taking out the same quantity.

After thus commenting upon the cases mentioned, the master of the rolls comes to the conclusion that none of them give support to the main point decided in *Ex parte Dale & Co.*, and he continues: "Now I come before parting with the case to the decision of *Pennell v. Deffell*, which is an equity case decided by the court of appeal in chancery, and therefore of as high authority as any of those cases cited, and of greater weight, because it is more modern than the decisions of Lord Hardwicke and Lord Thurlow; and if inconsistent with them, would have overruled them."

It is of considerable importance to say here that, while *Knatchbull v. Hallett* deals with facts which show a misappropriation of funds held in a fiduciary capacity, still the general rule as to following funds impressed with a trust applies as well to cases where such funds were rightfully disposed of by persons who are pronounced by the law to be trustees whether technically such or treated to be such by construction or implication. And this was pointed out in apt words by the master of the rolls in the case before him.<sup>21</sup>

"The modern doctrine of equity as regards property disposed of by persons in a fiduciary position is a very clear and well-established doctrine. You can if the sale was rightful take the proceeds of the sale, if you can identify them. If the sale was wrongful, you can still take the proceeds of the sale, in a sense adopting the sale for the purpose of taking the proceeds, if you can identify them. There is no distinction, therefore, between a rightful and a wrongful disposition of the property, so far as regards the right of the beneficial owner to follow the proceeds. But it often happens that you cannot identify the

proceeds. The proceeds may have been invested together with money belonging to the person in a fiduciary position in a purchase." Then follows the argument showing that the beneficiary is entitled to a charge upon the property purchased with the "mixed fund," "for the amount of the trust money laid out in the purchase, and that charge is quite independent of the fact of the amount laid out by the trustee. The moment you get a substantial portion of it furnished by the trustee, using the word 'trustee' in the sense I have mentioned, as including all persons in a fiduciary relation, the right to the charge follows. This is the modern doctrine of equity. Has it ever been suggested, until very recently, that there is any distinction between an express trustee, or an agent, or a bailee, or a collector of rents, or any body else in a fiduciary position? I have never heard, until quite recently, such a distinction suggested." He then refers to *Ex parte Dale & Co.*, as the only place where such a distinction was made, and by Mr. Justice Fry, and overrules the same as having no foundation.

The case of bailor and bailee is pronounced to be governed by the same principle, when the bailee has mixed the proceeds arising from the disposition of the property of the bailor with his own funds. And so of any other person standing in a fiduciary position, whether in case of an express or a constructive or implied trust.<sup>22</sup>

The master of the rolls relied also upon *Frith v. Cartland*,<sup>23</sup> decided by Sir W. Page, Wood, V. C., and *Birt v. Burt*.<sup>24</sup> And the doctrine of equity discussed in *Knatchbull v. Hallett* is held to be known as well at law as in equity.<sup>25</sup>

<sup>22</sup> In the case of following a debt the master of the rolls said in this connection: "So it would be on the simple contract debt, that is, if the debt were of such a nature as that, between the creditor and the debtor, you could not sever the debt into two, so as to show what part was trust money, then the *cestui que* trust would have the right to charge upon the whole. Therefore, there is no difficulty in following out the rules of equity and deciding that in the case of a mere bailee, as Mr. Justice Fry has decided, you can follow the money." 18 Ch. D. 711.

<sup>23</sup> 2 H. & M. 417, 420 (1865).

<sup>24</sup> Reported in a note to *Ex parte Dale & Co.*, 11 Ch. D. 772 (1877).

<sup>25</sup> See the separate opinion of Thesiger, L. J., 13 Ch. D. 722. And in reading the English cases decided since the passage of the Judicature Act, 1873, look to the provision cited by Jessel, M. R., "that where there is a difference between the principles of law and

<sup>21</sup> 18 Ch. D. 708, bot., 709, 710.

The case of *Pennell v. Deffell*<sup>26</sup> was a controversy between Pennell, an official assignee in bankruptcy, and the administratrix of a preceding official assignee, as to money belonging to numerous estates in bankruptcy and deposited by the latter in two banks and there mixed with his own money on deposit. The deposits for the bankrupt estates were not designated as belonging to them when they were made, and in the case of one of the banks—the Bank of England—which by a standing rule refused to receive deposits made in that way—the assignee had been allowed by a special order to make deposits there in his individual name. A standing order of the court of bankruptcy required deposits to be made in the name of the estates to which they belonged. However, the banks were indifferent to the contest and the moneys were strenuously claimed for the general creditors of the deceased assignee, it being contended that the same had been so mingled and blended with the personal deposits standing to the credit of the assignee as to have become undistinguishable from them and not to be ascertained. The court, however, after deducting certain amounts which had been drawn upon by the general drafts of the prior assignee, ordered the balance to go to the use of the several estates in bankruptcy. The adjustment of this balance was made according to the rule in *Clayton's Case*<sup>27</sup> which was not followed, as already mentioned in *Knatchbull v. Hallett*.

In *Frith v. Cartland*,<sup>28</sup> parties who had been defrauded of certain acceptances by another who was in their debt were allowed to recover the proceeds of the acceptances against the assignees of their debtor who had promised to raise money upon the acceptances and pay his debt, but had converted them and invested the proceeds together with money obtained from another source in certain securities. He then absconded to Stockholm and was declared a bankrupt in England. He was pursued, the securities were found with him and returned to England and a considerable sum in cash was eventu-

equity the rules of equity are to prevail." 13 Ch. D. 712; The Supreme Court of Judicature Act, 1873, § 25, subsec. 11; Tomlinson on Judicature Acts and Rules, 1883.

<sup>26</sup> 4 De G. M. & G. 372.

<sup>27</sup> 1 Mer. 572.

<sup>28</sup> 2 H. & M. 417 (1865).

ally realized upon them. The change in the character of the original funds, the mixture of the proceeds with other funds and the second transmutation of those proceeds into the securities were found to present no difficulty in the way of tracing and identifying the property sought to be recovered. The court in the course of its judgment pointed out that through the entire transaction the amount of the funds pursued was always sufficient to cover the amount claimed by the defrauded parties.<sup>29</sup>

In *Ex parte Cooke, In re Strachan*,<sup>30</sup> the trustee under a will employed a stock-broker who had notice of the trust to sell out consols and invest the proceeds in railway stock. The broker sold the consols for cash and received the price in a check which he paid into his account at his bankers. He went into liquidation before he could make good a purchase of railway stock. The trustee was allowed to follow and recover the amount of the proceeds arising from the trust funds by proceeding in the court of bankruptcy. In that case Bramwell, J. A., said: "The use of checks may make difficulties in tracing money, but that, so far as it can be traced, it may be claimed as the property of the client, appears to me to be covered by the reason of the thing and by the authority of *Taylor v. Plumer*."

In *Birt v. Burt*,<sup>31</sup> the trustees under Lord Southampton's will were allowed to follow certain purchase money which had been received by one Birt while acting as agent in the sale of Lord Southampton's estates and which Birthad placed, during his life-time, to his own account with his bankers. The trustees filed a petition in an action for the administration of Birt's estate to have the amount of the purchase money transferred to a suit which had been instituted for the administration of Lord Southampton's estate. The petition was allowed by Malius, V. C., and on appeal the court of appeal (Jessel, M. R., Coleridge, C. J., and Baggallay, L.

<sup>29</sup> Baggallay, L. J., made a similar observation in *Knatchbull v. Hallett*, 13 Ch. D. 731: "It is further to be noted and it is to my mind a material circumstance that the balance to the credit of the account never fell below the aggregate of the sums of trust money."

<sup>30</sup> 4 Ch. D. 123 (1876), cited by Thesiger, L. J., in *Knatchbull v. Hallett*, 13 Ch. D. 722.

<sup>31</sup> Reported in a note to *Ex parte Dale & Co.*, 11 Ch. D. 773 (1877).

J.), considered the case too clear for argument and dismissed the appeal with costs.

We now reach a case to which the ruling made in *Knatchbull v. Hallett* was held to be inapplicable. In *Ex parte Hardcastle*<sup>32</sup> the court, after distinguishing that case, said: "I take it to be absolutely necessary that in all cases like the present the existence of the fund in a distinct shape should be made out." A sum of £800 was received for reinvestment by a solicitor from the trustees under a marriage settlement made by him. Several months afterwards he deposited a sum of £800 at his bankers to his own credit and sometime subsequently failed and went into liquidation. The trustees under the marriage settlement claimed that the £800 now deposited was the same as the £800 received from them, and sought to recover in the court of bankruptcy a balance of some £799 which stood to the credit of the bankrupt at the bankers at the time of the proceedings. But proof definitely showing such fact was wanting, and the trustee in liquidation was adjudged to be entitled to the balance for the general creditors of the bankrupt. The court seems to have been of opinion that the £800 received from the trustees under the marriage settlement was dissipated by the solicitor, and that the £800 deposited arose from a source entirely distinct from the funds received from those trustees, and upon this view the case is clearly distinguishable from a similar claim made by the trustees under the marriage settlement of Hallett in *Knatchbull v. Hallett*.

<sup>32</sup> 44 Law T. (N. S.) 523 (1881).

#### MUTUAL BENEFIT ASSOCIATION—CHANGING BENEFICIARY.

#### BROWN V. GRAND LODGE OF IOWA OF THE A. O. OF N. W.

*Supreme Court of Iowa, May 26, 1890.*

1. A member of a mutual benefit association has the right at any time, with the consent of the association, to make a change in his beneficiary, without requiring the consent of the beneficiary, for the reason that such beneficiary has no vested rights in the certificate of membership until the death of the member occurs.

2. The fact that the member obtains the certificate from the one designated in it as beneficiary, to whom he had delivered it, by fraud, does not change the rule

GRANGER, J.: It should be conceded at the outset that James Grace obtained the certificate

from plaintiff by misrepresentation or fraud. We regard this fact as found by the district court, and we must consider the case with it in full view. With this point settled at the outset, we dispose of much said in argument in relation thereto, and bring ourselves to what we regard as the controlling question in the case.

Appellant concedes that if James Grace had procured the certificate with plaintiff's name therein as the beneficiary, and had retained possession thereof, he would have had the right to surrender it, and take a new certificate with another person as beneficiary, because he could then surrender the certificate, as he was required to do by the laws of the order. But it is urged that in this case he had parted with the possession of the certificate, and made a gift thereof to the plaintiff, by which she obtained a vested right or interest therein; and this is urged as the distinguishing feature of the case. Inasmuch as the certificate was in the possession of James Grace, and by him surrendered when the new certificate issued, the force and effect of such possession is sought to be avoided by the fact that the possession was fraudulent, and that James Grace could legally take no advantages from such possession. We think it must be conceded that the possession of the certificate by James Grace gave him no rights, as against plaintiff, that he was not entitled to before she surrendered the certificate. If she had such a vested interest therein that she could legally have refused her father the possession thereof for the purpose of changing the beneficiary, as he did, we should strongly incline to the view—with the situation of this case as to the parties actually in interest—that he could not defeat such right by such indirect or fraudulent methods. If, on the other hand, she had no such interest in the certificate as would justify her in retaining it from him, if he desired it for such purpose, then she suffered no prejudice from the fraud, and is in no position to complain, or at least she is not in a position, because of fraud, to claim as absolutely hers what before was only conditionally so. What, then, were the rights of the plaintiff because of the fact of her possession of the certificate? The authorities will be better understood if we keep in view the effect of naming a person in a certificate as beneficiary without surrendering to him the possession, which is that it gives to such person no rights before the death of the assured, and that the certificate is revocable at the pleasure of the assured, under the provisions of the laws of the society. The authorities on the point are uniform, and are not questioned in this case. How, then, does the mere delivery of the certificate to the beneficiary change the right? It being only the evidence of what in law is a mere expectancy, the delivery of it conveys no present right; for no present right exists. The assured has no vested property rights that he can convey. Bac. Ben. Soc. § 289. The section says: "The member of a beneficiary organization, on the

other hand, as we have seen, has no property interest in the benefit, but only the naked power of designating some one to receive it. This designated recipient, also, has no property nor vested rights in the benefit, because his interest is contingent and uncertain; the power of the member to revoke the appointment and substitute a new beneficiary being specially reserved by the laws of the society, which laws enter into, and form a part of, the contract"

The possession of the certificate by the beneficiary makes her no more than a beneficiary. A beneficiary has no vested rights until the death of the member occurs. *Society v. Burkart*, 10 N. E. Rep. 79; *Richmond v. Johnson*, 28 Minn. 447, 10 N. W. Rep. 596. In this respect a certificate in a beneficiary association differs from an ordinary life-policy, and this difference, as expressed in *Society v. Burkhart, supra*, is as follows: "In the one case the rights of the beneficiary are fixed and vested from the moment the policy takes effect. In the other, they are subject to such changes as the law of the association authorizes the member to make. All that a beneficiary has during the life-time of a member, owing to his right of revocation, is a mere expectancy dependent upon the will and pleasure of the holder of the certificate. This expectancy is not property. *Durian v. Central Verein*, 7 Daly, 168." The case of *Byrne v. Casey*, 8 S. W. Rep. 38, is a Texas case, and involves the effect of a gift; and that particular point was urged, as in this case. Byrne took a certificate in a benefit association, with his wife therein as beneficiary, and delivered to her the certificate, which she kept for about one year, and paid several assessments thereon, and delivered it to the defendant Casey for safe-keeping. Byrne, without the knowledge or consent of his wife, withdrew the certificate from Casey, surrendered the same, and took a new one with Casey and Swasey as beneficiaries. Mrs. Byrne had no knowledge of any change in the certificate until after the death of Byrne. A significant feature of that case is that, when the certificate issued, the laws of the society gave a member the right to change the beneficiary in his certificate, with "the consent of his beneficiary indorsed thereon." After the delivery of the certificate to Mrs. Byrne, and without knowledge to her, the society so changed its laws as to strike out the clause with reference to the consent of the beneficiary; and thereafter and under the law as changed, Byrne effected a change of beneficiaries. The facts of that case are stronger in favor of Mrs. Byrne than are those of this case in favor of the plaintiff. In that case, as in this, the society placed the money in court, and the question was presented as to the rights of the respective beneficiaries. The court held in favor of those named in the latter certificate, and placed its holding on the rule that "the beneficiaries named have no perfect or vested rights in the certificate; that the rules as to change of the beneficiaries were for the protection of the

order; and that the member, under the by-laws, could determine the course of the benefit fund against those named as beneficiaries in the certificate." The court cites in support of this holding *Splawn v. Chew*, 60 Tex. 534; *Manning v. Ancient Order*, 5 S. W. Rep. 385; and *Society v. McVey*, 92 Pa. St. 510.

Keeping in view the fact that the plaintiff in this case, even with the possession of the certificate, was no more than a beneficiary, we may profitably quote from our statute. A part of section 7, ch. 65, Acts 21 Gen. Assem., is in these words: "Any member of any corporation, association, or society operating under this act shall have the right at any time, with the consent of such corporation, association, or society, to make a change in his beneficiary without requiring the consent of such beneficiary." The act is one for the regulation of mutual benefit associations; and, while it recognizes an authority or control as to such changes on the part of the association, it clearly authorizes such changes without the consent of the beneficiary. Appellant does not in argument question the validity of this statute; and we must not, in any sense, be understood as holding that such a statute could operate to impair vested rights. We have cited it in connection with authorities holding that such beneficiaries have no vested rights.\*

The case of *Fisk v. Union*, from the Supreme Court of Pennsylvania (11 Atl. Rep. 84), is one, also, in which there was a delivery of the certificate by the wife, who was a member of the union, and her husband the beneficiary. Besides the possession of the certificate, he paid all the assessments on it, and the wife changed the beneficiaries. The court says: "Notwithstanding the fact that the certificate was delivered to the plaintiff, and the assessments thereon were paid by him, his wife had the right, on presenting it to the supreme secretary, to apply for and effect a change in the designation of the beneficiary named therein. \* \* \* When plaintiff accepted the original certificate, and paid the assessments thereon, he knew, or ought to have known, that he held it subject to the right of his wife to change the designation of those to whom the insurance money should be paid upon her death." These cases seems quite conclusive of the question before us. Whatever consequences should attach to the fraudulent acquisition of the certificate, it could not have the effect of creating a vested right where none existed before. If the plaintiff, with the possession of the certificate, had no such right therein as would defeat the right of her father to change the beneficiary, she had no such right as would justify her retention of it if he demanded it for that purpose.

Appellant cites some authorities claimed to announce a different rule; but we think, with similar facts, there is no serious conflict. Some of the authorities cited by appellant we have cited in support of our holding. Others are

unlike this case as to facts; some of them being cases where the insurance was in "old line companies," wherein a different rule is conceded because of vested rights from the issuing of the policy. With these views, the judgment of the district court must be affirmed.

**NOTE.**—It is believed that the rule announced in the principal case is in perfect accord with the authorities. Upon the proposition which controls the decision there seems to be no serious conflict. The cases properly proceed upon the principle that the beneficiary designated in the certificate of a member of a mutual benefit society takes no vested interest therein until the consummation of the contract, to-wit: the death of the member. The rights possessed by the beneficiary are merely contingent, and may be destroyed by the act of the member at any time without the former's knowledge or consent. Designating another as beneficiary, in accordance with the contract between the member and the society, defeats this contingent right.<sup>1</sup>

The right to change beneficiaries by mutual agreement of the member and the association exists independent of the constitution, by-laws and regulations of the society, and may be exercised when not limited by such constitution and by-laws.<sup>2</sup> The general rule is that, when not prohibited by the charter, constitution or by-laws, a member of a mutual benefit society may change the beneficiary named in the certificate of membership at will; however, where the charter or laws designate who shall be beneficiaries, no other persons than those so designated can be made beneficiaries.<sup>3</sup>

An incorporated benefit or benevolent association may make reasonable regulations defining the methods by which a member may change the beneficiary named in the benefit certificate. The adoption of a particular method of changing a benefit certificate under the powers and within the limits of the charter of a benevolent benefit society amounts to an exclusion of all other methods.<sup>4</sup> That is to say, the change must be made in the manner pointed out by the rules and regulations of the society, for these become and are a part of the contract between the society and the member.<sup>5</sup>

<sup>1</sup> Knights of Honor v. Watson (N. H.), 15 Atl. Rep. 125; Union Mutual Aid Assn. v. Montgomery, 70 Mich. 587, 38 N. W. Rep. 588; Grand Lodge A. O. U. W. v. Child, 70 Mich. 163, 38 N. W. Rep. 1; Masonic Mut., etc. Assn. v. McAuley, 2 Mackey (D. C.), 70; Niblack on Mut. Ben. Soc. §§ 220, *et seq.*, notes in 18 Am. & Eng. Corp. Cas. pp. 615, *et seq.*; Bacon on Ben. Soc. § 307.

<sup>2</sup> Bloomington Mut. Life B. Assn. v. Blue, 120 Ill. 121; Hurlbert v. Hurlbert, 1 N. Y. Sup. 854; Tyler v. Odd Fellows M. R. Assn., 145 Mass. 134; Mayer v. Association, 2 N. Y. Sup. 79; Massey v. Mutual R. Assn., 102 N. Y. 523; Mannely v. Knights of Birmingham, 115 Pa. St. 395.

<sup>3</sup> Holland v. Taylor, 111 Ind. 121, 12 N. E. Rep. 116; Massey v. Mutual Relief Soc., etc. (N. Y. Ct. App.), 7 N. E. Rep. 619; Presbyterian Assn. Fund v. Allen, 106 Ind. 503, 7 N. E. Rep. 317; Mitchell v. Grand Lodge Iowa Knights of Honor, 70 Iowa, 360, 30 N. W. Rep. 965; Whitehurst v. Whitehurst, 85 Va. 153, 1 S. E. Rep. 801; Masonic Mut. Ben. Soc. v. Burkhardt (Ind.), 11 N. E. Rep. 449.

<sup>4</sup> Coleman v. Knights of Honor, 18 Mo. App. 189; Highland v. Highland, 13 Ill. App. 510; Nat. Mut. Aid Society v. Lupold, 101 Pa. St. 111; Vollman's Appeal and Lang's Estate, 92 Pa. St. 50; Head v. Providence Ins. Co., 2 Cranch, 127; Leonard v. Am. Ins. Co., 97 Ind. 299; Hotel Men's Assn. v. Brown, 38 Fed. Rep. 11.

<sup>5</sup> Wendt v. Iowa Legion of Honor, 72 Iowa, 682, 34 N. W. Rep. 470.

The fact that the designated beneficiary pays the premiums, contributions or assessments will not deprive the member of the right to make a change of beneficiaries.<sup>6</sup>

Where the constitution of the association provides "that any member holding a benefit certificate, desiring at any time to make a new direction as to its payment, may do so by authorizing such change in writing," etc., this confers authority upon the member to change the beneficiary without consent of the first designated.<sup>7</sup>

In a leading Texas case, the by-law provided: "Applicants shall enter upon their application the name or names of the members of their family dependent upon them, to whom they desire their benefit paid, and the same shall be entered in the benefit certificate, etc., subject to such future disposal among their dependents as they themselves direct." It was held that such by-law vested the control of the certificate, so far as the selection of the beneficiary was concerned, in the member insured; and further that a clause or by-law of an insurance company, pointing out a way in which the right to dispose of the insurance money may be exercised, or relating to some other rights, merely directory in its character, and whose object is to protect the corporation, cannot be taken advantage of by outside parties claiming the insurance or other right under the charter of such corporation. Such provisions are for the protection of the company alone, and can only be used by it.<sup>8</sup>

<sup>6</sup> Fisk v. Equitable Aid Union (Pa.), 11 Atl. Rep. 84.

<sup>7</sup> Lamont v. Grand Lodge Iowa Legion of Honor (U. S. C. C. N. D. Iowa, E. D.), 81 Fed. Rep. 177.

<sup>8</sup> Splawn v. Chew, 60 Tex. 532.

#### JETSAM AND FLOTSAM.

**FEES OF NEW YORK LAWYERS.**—The New York *Evening Journal* gives an account of the fees of some of the ten thousand lawyers of New York and Brooklyn. The following are a few of the items: The most widely known and without doubt lucrative law firm in New York is Evarts, Choate & Beaman, with magnificent offices at No. 152 Wall street. The senior is the alphabetical senator, Senator William M. Evarts, whose active interests during the session of the Senate, is very slight. Hon. Joseph H. Choate, a host in himself, is the pleader. The firm's earnings are said to be \$500,000 annually. Mr. Choate's fees are enormous. The next in importance is Tracy, MacFarland, Boardman & Platt, with offices at No. 35 Wall street. The senior is Secretary of the Navy, Benjamin F. Tracy, the "counsel." Mr. Frank H. Platt is a son of Thomas C. Platt, while A. B. Bordman is well known as a constitutional lawyer. The clever William M. Ivins has recently allied himself with this firm, which has for a month or more been interested in the attempt to overthrow Tammany Hall. William W. MacFarland is the other partner. The firm's business is, by good judges, said to be worth \$400,000 annually. Coudert Brothers have a monopoly of the French business. The firm is Charles and Frederick R. Coudert, and its income is not far from \$350,000. Its practice is by no means confined, and is very general in its character. The firm of Bangs, Stetson, Tracy & MacVeagh, of which Grover Cleveland is a recent acquisition, has an income of \$300,000. Mr. Cleveland has become a

great drawing card, and to him are referred the many big cases requiring great research. Seward, Da Costa & Guthrie devote their attention almost exclusively to corporation law. Clarence Seward, the head, seldom practices other than in United States courts. The firm's income is between \$250,000 and \$300,000. Colonel Robert G. Ingersoll has one of the largest individual practices in New York. It is said of him that he will not accept a retainer of less than \$500, with fees running high into the thousands. Colonel Ingersoll is one of the most approachable of the heavier legal lights. His earnings with his pen and legal knowledge are between \$75,000 and \$100,000 a year. Daniel Dougherty, the "silver-tongued," has two offices, one in New York, the other in Philadelphia. His income is not far from \$50,000. The largest firm which devotes a large part of its time to the practice of criminal law, is that of Howe & Hummel. Wm. F. Howe, the melter of jurymen's hearts, attends exclusively to the criminal end, while little Abe Hummel delves into the intricate questions of civil practice. Between them they divide \$100,000 annually.

**READING OPINIONS FROM THE BENCH.**—The Supreme Court of the United States—we say this with great respect—wastes considerable public time every Monday in reading the opinions of the court from the bench. Such a waste cannot be justified in the overcrowded state of the docket of that court. The court is substantially four years in arrears with its ordinary work, and in many cases an appeal to it, or a writ of error from it is, by reason of the mere delay which ensues, a denial of justice. Whatever may be due to precedent, it would therefore seem that the judges are bound, out of justice to the suitors before them, not to make an unnecessary waste of public time. The opinions delivered by the judges of that court, are, it is well known, carefully put in type by the public printer and revised before they are delivered. As soon as they are announced from the bench, it is supposed that counsel for the parties interested can readily obtain duplicate copies of them from the clerk. There is, therefore, no reason, in the nature of things and having references to any question of utility or practical convenience, for the judges to consume the better part of one judicial day in reading opinions, which reading, for the most part, falls upon dull ears. A court which is not distinguished for the deference with which it listens to useless argument, should not, we respectfully submit, consume time in this way, in observance of a worn-out custom—a custom which appears to have been formed at a time when the court had but few cases before it and when each of its opinions on an important question assumed the form of a laborious treatise.—*American Law Review.*

#### RECENT PUBLICATIONS.

**A PRACTICAL TREATISE ON THE LAW OF REPLEVIN AS ADMINISTERED BY THE COURTS OF THE UNITED STATES.** Arranged in Three Parts to facilitate ready reference. By J. E. Cobbe, B. S., L. L. B. Published and sold by J. E. Cobbe, Beatrice, Nebraska.

A good work on any subject is always in order and a work on the subject of replevin is, to say the least, not welcome. The subject is one of every-day practical value, and questions concerning it arise with increasing frequency in the practice of every attorney. The first work on Replevin was by Gilbert in 1756; followed by Wilkinson in 1825; and by Morris in 1848.

These were followed by Wells in 1880 and as the use of the writ has been greatly enlarged in late years, there is a positive demand for a more modern, comprehensive and exhaustive treatise on the subject. The writer of this book states that it is the result of an earnest endeavor to make a reliable, useful and comprehensive statement of the law of replevin, not only in its general but special forms. The work is exhaustive of the subject, contains almost one thousand pages and cites eleven thousand cases. Part I. Treats of questions arising in preparing to commence a replevin action. Part II. Of questions arising in the prosecution and defense of an action in replevin. Part III. Of questions arising in the prosecution and defense of an action on the replevin bond. The style of the author is concise and clear, and the work has evidently been prepared with conscientious regard for accuracy and completeness. The arrangement of topics and subjects is particularly to be commended, and the index is first-class.

#### BOOKS RECEIVED.

**HISTORY OF THE COURT OF CHANCERY and of the Rise and Development of the Doctrines of Equity.** By A. H. Marsh, one of her Majesty's Counsel. Toronto: Carswell & Co., Publishers. 1890.

**A TREATISE ON THE LAW OF SHERIFFS and other Ministerial Officers.** By William L. Murfree, Sr. Second Edition. Revised by Eugene McQuillin, of the St. Louis Bar. The Gilbert Book Company, St. Louis, Mo. 1890.

**THE COMPLETE DIGEST. A DIGEST OF ALL THE REPORTED AMERICAN CASES AND SELECTED ENGLISH CASES, with Synopses of Statutes of General Interest, Reference to Articles and Essays in Current Law Periodicals, and to Text-books and other matters of Value to the Profession, contained in the Official Reports and various other Law Publications.** 1888 Supplement. Being also a Supplement to Vol. XIX. United States Digest, New Series (Annual Digest for 1888). Editors: E. A. Jacob, J. A. Mallory, Peter Kemper, F. B. Walrath. New York: Digest Publishing Co., Publishers. 1890.

**RIGHTS, REMEDIES AND PRACTICE at Law, in Equity and under the Codes. A Treatise on American Law in Civil Causes, with a Digest of Illustrative Cases.** By John D. Lawson, Author of Works on Presumptive Evidence, Expert Evidence, Carriers, Usages and Customs, Defenses to Crimes, etc. In seven volumes. Volume 6. San Francisco: Bancroft-Whitney Co. Law Publishers and Law Booksellers. 1890.

#### HUMORS OF THE LAW.

The author of "Circuit Notes" in the *Cornhill Magazine* gives an amusing instance of an admission made by a prisoner after acquittal, which, if made a few moments earlier, would have effectually knotted the rope for the delinquent.

Once a prisoner was being tried for murder, the evidence against him being purely circumstantial; part of it, a hat found near the scene of the crime, an ordinary round black hat, but sworn to as the prisoner's. Counsel for the defense, of course, made much of the commonness of the hat. "You gentlemen, no doubt, each possess such a hat, of the ordinary make and shape. Beware how you condemn a fellow-creature to a shameful death on such a piece of evidence"—and so on. So the man was acquitted. Just as he was leaving the dock, with the most touching humility and simplicity, he pulled his hair and said, "If you please, my lord, may I 'ave my 'at'?"

## WEEKLY DIGEST

**Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.**

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1. ACCOUNT—Evidence.—Code Civil Pro. Cal. § 454, providing that a party need not set forth in a pleading the items of an account sued on, but he must deliver to the adverse party, within five days after a demand thereof in writing, a copy of the account, or be precluded from giving evidence thereof, does not prevent a party who has furnished a copy of the account from explaining it, and showing that some of the items in the account, from which the copy furnished was taken were carried into it by mistake.—*Graham v. Harmon*, Cal., 28 Pac. Rep. 1097.

2. ADMIRALTY—Charter party.—When a charter-party provides that, for supplies furnished on the order of the master, the charterers shall have a draft or obligation of the master and a lien on the vessel, and necessary supplies are furnished by the charterers on the order of the master and the creditor of the vessel, the charterers have a lien on the vessel, both under the general maritime law and the contract of charter.—*Moore v. The Robtiant*, U. S. C. C. (La.), 42 Fed. Rep. 162.

3. ADMIRALTY—Wharves.—A ship compelled by stress of weather to moor to a wharf for safety is not liable to a charge for wharfage where the wharf is a private one, and no fixed rate of charge is in use.—*Heron v. The Marquess*, U. S. C. C. (Fla.), 42 Fed. Rep. 173.

4. APPEAL—Jurisdiction.—Under Rev. St. Ill. 1889, ch. 37, § 25, which provides that appeals from the Illinois appellate court in actions *ex contractu*, involving less than \$1,000, can only be taken when the judges issue a certificate that the questions involved are important, an order allowing an appeal in such a cause, which does not state that the questions involved are important, and which is entered after expiration of the time limited for taking an appeal, confers no jurisdiction of the cause on the supreme court.—*Indiana, etc. Ry. Co. v. Sampson*, Ill., 24 N. E. Rep. 699.

5. APPEAL—Jurisdiction.—Where, upon a bill involving a freehold, and a cross-bill, involving merely a money demand, a decree is rendered granting the relief prayed for in both bills, an appeal from that part of the decree which is based upon the cross-bill does not involve a freehold, within the meaning of the Illinois statutes regulating appeals.—*Moore v. Williams*, Ill., 24 N. E. Rep. 617.

6. APPEAL—Notice.—Where the notice of appeal is addressed to the attorneys for the appellee and the clerk

of the district court, but it does not appear that it was served on the clerk as required by Code Iowa, § 4406, to perfect the appeal, the supreme court has no jurisdiction, and the appeal must be dismissed.—*Redhead v. Baker*, Iowa, 45 N. W. Rep. 733.

7. APPEAL—Objections not Raised Below.—Where, with plaintiff's consent, defendant in divorce files an amended cross-complaint setting up adultery committed by plaintiff, since the beginning of the action, plaintiff, after going to trial on the issues raised thereby, cannot object for the first time on appeal that the amended cross-complaint contained no prayer for affirmative relief.—*Kirsch v. Kirsch*, Cal., 28 Pac. Rep. 1083.

8. ARBITRATION—Award.—When, in a pending case referred by the parties under a rule of court, the umpire participates in the decision, and joins in the award without having heard the parties or the oral evidence, it is cause for setting aside the award.—*Byrne v. Usry*, Ga., 11 S. E. Rep. 561.

9. ASSOCIATION—Monopolies.—An association organized for the purpose of increasing the price of a commodity of general use is contrary to public policy and a claim based upon an enforcement of the agreement by which the association was formed can receive no aid from a court of justice.—*Emery v. Ohio Candle Co.*, Ohio, 24 N. E. Rep. 660.

10. ATTACHMENT—Levy.—The return of a writ of attachment of land occupied as a residence by defendant, which recites that it was levied on the land, describing it by metes and bounds, and that a true copy of the process was delivered to defendant, is insufficient, under Code Miss. § 2424, requiring that in such case the officer shall go to the house of defendant, and there declare that he attaches the land; and section 2425, which requires the officers serving the writ to make a full return of his proceedings;—and no lien is fixed thereby.—*People's Bank v. West*, Miss., 7 South. Rep. 513.

11. ATTORNEY AND CLIENT—Compensation.—In an action by attorneys to recover for professional services, there was a conflict in the evidence as to the question by whom plaintiff were employed, but there was evidence that defendant's authorized agent had employed them for her: Held, that it was proper to refuse an instruction, that "if the defendant, by himself or authorized agent, did not make any express contract with plaintiffs for employment, and if she had reason to believe that plaintiffs were employed by another attorney to assist him, under a contract by which he was authorized to employ counsel to assist him, her acquiescence when she saw plaintiffs taking part in the trial is not a circumstance from which the jury has a right to infer that an implied contract existed by which the plaintiffs were entitled to charge her with any fee, and the jury will find for defendant."—*Price v. Hay*, Ill., 24 N. E. Rep. 620.

12. BANKS—Overdraft.—Where a person who has overdrawn his account with a bank deposits therein money held by him, as treasurer of a school-district, such deposit will constitute a payment of the overdraft, where it is made in his own name, and the bank acquiesces in his use of it as his own, and so treats it, though knowing that it is public money.—*Hale v. Richards*, Iowa, Ill., 45 N. W. Rep. 734.

13. CARRIERS.—After the brakeman had announced the name of a station at which a railroad train had been accustomed to stop, the train stopped at the station platform, but started up again almost immediately and ran 50 yards further, where it stopped long enough to allow the passengers to alight: Held, that the passengers bound for that station had a right to presume that they were to alight at the first stop, and that for injury received, while attempting to do so, by reason of the insufficient length of the stop, the carrier was liable.—*McNulty v. Ensch*, 24 N. E. Rep. 631.

14. CARRIERS—Passengers on Freight Train.—One who takes passage on a freight train rather than wait a few hours for a passenger train, and is injured by a jolt

caused by coupling cars, cannot recover, where the jolt was not caused by the negligence of the company's servants, but was usual and necessary in coupling the cars. — *Crine v. East Tennessee, etc. Ry. Co.*, Ga., 11 S. E. Rep. 555.

15. CHATTTEL MORTGAGE. — A debtor in failing circumstances conveyed all his property, real and personal, to a creditor, who assumed and paid all his other debts. The business was thereupon carried on by the debtor, as agent, under an arrangement by which he was to take out of the proceeds enough money for his personal expenses, and pay the residue to such creditor, and when the latter had received the full amount of his advances, and interest, the property was to be reconveyed to the debtor: *Held*, that the transaction was a mortgage. — *Whittemore v. Fisher*, Ill., 24 N. E. Rep. 636.

16. CONTEMPT—Libel.—The publication of an article in a newspaper is not a contempt unless it reflect upon the conduct of the court in reference to a pending suit or proceeding, and tends in some manner to influence its decisions therein, or to impede, interrupt, or embarrass the proceedings of the court in reference thereto. — *State v. Kaiser*, Oreg., 23 Pac. Rep. 964.

17. CONTRACT—Consideration.—The shipment of goods by a debtor to a third person, on whom he has given his creditor an order for the proceeds, is a sufficient consideration for the acceptance of the order, and the acceptor becomes the debtor to the amount of the goods shipped and received. — *Olds Wagon-works v. Combs*, Ind., 24 N. E. Rep. 589.

18. CONTRACT—Usury.—Mansf. Dig. Ark. § 4732, makes a usurious loan absolutely void as to both principal and interest. Defendant executed a deed, absolute in form, to secure a loan. Afterwards he obtained a usurious loan from plaintiff, who at his request paid the original debt, and took a deed from the creditor as security. This deed being void because of the usury, the court below decreed that plaintiff should be subrogated to the rights of the original creditor, and ordered a foreclosure of the original mortgage: *Held*, error, since equity will not aid one who is compelled to prove an illegal contract in order to establish his claim. — *Nichols v. Trible*, Ark., 13 S. W. Rep. 796.

19. CORPORATIONS—Preferences. — A corporation for profit, organized under the laws of Ohio, after it has become insolvent and ceased to prosecute the objects for which it was created, cannot by giving some of its creditors mortgages on the corporate property to secure antecedent debts, without other consideration, create valid preferences in their behalf over the other creditors, or over a general assignment thereafter made for the benefit of creditors. — *Sayler v. Simpson*, Ohio, 24 N. E. Rep. 596.

20. CORPORATIONS—Receivers. — In a proper case, a court of equity, having the possession by a receiver of the property of an insolvent railway company, may make an interlocutory order for the sale of the property before the rights of the parties under several mortgages have been fully ascertained and determined. — *Pennsylvania, R. Co. v. Allegheny, etc. R. Co.*, U. S. C. C. (Penn.), 42 Fed. Rep. 82.

21. CORPORATIONS—Residence. — A corporation does not acquire a residence in a State other than one in which it is incorporated by maintaining an office and having an agent there, within the meaning of Act Cong. March 3, 1887, which provides that, "where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." — *Bensinger Self-adding Cash Register Co. v. National Cash Register Co.*, U. S. C. C. (Mo.), 42 Fed. Rep. 81.

22. CORPORATIONS—Stockholders. — Where a corporation which is authorized by its charter to buy land, and pay for it in full-paid stock, issues such stock in payment for land to an amount greatly in excess of the value of the land, and the stock is sold to a purchaser for value, such purchaser is not liable to the

creditors of the corporation on the ground that his stock is not fully paid for, where there was no fraud in the original transaction, and the corporation has taken no steps to rescind it. — *Du Pont v. Wilden*, U. S. C. C. (Ill.), 42 Fed. Rep. 87.

23. CORPORATIONS — Subscriptions to Stock. — The statute (§ 4, ch. 34, Gen. St. 1878) does not abrogate the common-law rule that, where the charter or articles of a corporation, or the terms of subscription to its capital stock, do not provide otherwise, payment of a subscription cannot be required till the whole capital stock is subscribed. — *Masonic Temple Assn. v. Channell*, Minn., 45 N. W. Rep. 716.

24. CORPORATIONS—Turnpike Company. — A charter of a turnpike company which authorizes an organization when "\$200 to any one mile" are subscribed, is substantially complied with by a subscription of \$200, without designating any particular mile of road to which it shall be applied. — *Fitch v. Poplar Flat, etc. Turnpike Co.*, Ky., 13 S. W. Rep. 791.

25. COUNTIES — Deposit of Public Moneys. — No authority is given by chapter 189 of the Laws of 1889 to the board of county commissioners to designate a bank or banks for the deposit of the public moneys for a definite period of time; nor can the board make any order or make any contract with the depository that will prevent the designation of a different depository whenever the board in its discretion determines that the public interest will be best subserved by such a change. — *First Nat. Bank v. Peck*, Kan., 23 Pac. Rep. 1077.

26. CRIMINAL LAW — Defiling Female Ward. — Under Rev. St. Mo. 1879, § 1260, providing that, "if any guardian of any female under the age of 18 years, or any other person to whose care or protection any such female shall have been committed, shall defile her by carnally knowing her while she remains in his care, custody, or employment," he shall be punished, a conviction may be had of one in whose family such female was employed to look after his children; there being evidence that he promised his father to give her clothing and board, and send her to school, and treat her like one of his children. — *State v. Stratman*, Mo., 13 S. W. Rep. 814.

27. CRIMINAL LAW—Habeas Corpus. — In a prosecution for burglary, the objection that the information was filed without a previous preliminary examination and commitment can only be made by a motion to set aside before the trial. It cannot be urged for the first time in a proceeding on *habeas corpus*. — *Ex parte McConnell*, Cal., 23 Pac. Rep. 1117.

28. CRIMINAL LAW—Rescue. — Rev. St. Ill. ch. 88, § 87, makes it a felony to "attempt to set at liberty or rescue" a person charged with felony. Section 92 makes the conveying into a jail any tool adapted to aid a prisoner in escaping, punishable by fine, and imprisonment in the county jail: *Held*, that an attempt to convey saws and files to a prisoner confined on a charge of murder, being merely an attempt to commit the offense mentioned in § 92, was not indictable under § 87. — *Patrick v. People*, Ill., 24 N. E. Rep. 619.

29. CRIMINAL LAW—Theft. — The indictment for the theft of a bale of cotton laid the possession in the owner. The proof showed that the owner took the cotton to a gin to be ginned and baled, and that after this was done it was put into the gin yard with other cotton; that the owner took it from there, and removed it some 50 yards from the gin-house: *Held*, that there was no variance between the allegation and the proof. — *Doss v. State*, Tex., 13 S. W. Rep. 788.

30. CRIMINAL PRACTICE—Evidence. — Where the pressure of the case is not upon the *corpus delicti*, but upon the question who is the guilty party, and all the evidence incriminating the accused is circumstantial, it is error for the court to instruct the jury that the case is not founded entirely upon circumstantial testimony, but that there is both positive and circumstantial evidence. — *Simmons v. State*, Ga., 11 S. E. Rep. 555.

31. CRIMINAL PRACTICE — Swindling. — An indictment for swindling, which fails to allege the ownership of

the property acquired by the swindle, is fatally defective.—*Mays v. State*, Tex., 18 S. W. Rep. 787.

**32. DEATH BY WRONGFUL ACT.**—The administrator of a person whose death is caused by the wrongful act, neglect, or default of another may maintain two actions—one under the act of 1888, for the benefit of the estate, and the other under the act of 1888, for the benefit of the next of kin.—*Davis v. St. Louis, etc. Ry. Co.*, Ark., 18 S. W. Rep. 801.

**33. DEDICATION.**—The sale of land described as bounded on a certain street is at least an offer of dedication of the street, which is sufficiently accepted by a resolution of the city council accepting as public streets all streets which have been dedicated by the owners thereof.—*City of Eureka v. Armstrong*, Cal., 23 Pac. Rep. 1085.

**34. DEED—Boundaries.**—Where a patent of land is issued with boundaries as described in a survey and map made by a government surveyor, who has also made field-notes giving not only courses and distances, but also monuments and the various topographical features of the country, the calls for monuments will control the courses and distances in relocating the boundaries of the patent.—*Tognazzini v. Morganti*, Cal., 23 Pac. Rep. 1085.

**35. DEED—Implied Covenants.**—Under the Illinois statute which makes the insertion of the words "grant, bargain, and sell" in a deed constitute a covenant of warranty, such covenant is not created by the use of the word "grant."—*Wheeler v. Wayne County*, Ill., 24 N. E. Rep. 625.

**36. DEED—Undue Influence.**—That a grantor is of advanced age, feeble health, and impaired memory is not sufficient to render his deed void, where the evidence shows that when he executed it he fully comprehended what he was doing, and that for more than a year afterwards he continued to manage his affairs prudently.—*Burt v. Quisenberry*, Ill., 24 N. E. Rep. 622.

**37. EJECTMENT—Judgment.**—After judgment in an action of ejectment between tax-title holders, the successful claimant makes motion for an *alias* writ of restitution against a purchaser from the original owner, who is then in possession, but who was not a party to the action, and the court makes an order against him, determining adversely his right of possession in favor of the successful claimant: *Held*, that the purchaser can bring the case here for review, and the trial court erred in determining, in effect, his title and right to possession on such motion.—*Webster v. Filley*, Kan., 23 Pac. Rep. 1080.

**38. ELECTIONS—Ballots.**—In the absence of any evidence of fraud, the fact that ballots have not been sealed up after the election, as required by statute, does not render them inadmissible in evidence upon the hearing of a contest.—*Blankenship v. Israel*, Ill., 24 N. E. Rep. 615.

**39. EQUITY—Jurisdiction.**—Where a court of equity has acquired jurisdiction of the parties, it may declare void a deed to lands located in another State, and compel a reconveyance.—*McGee v. Sweeny*, Cal., 23 Pac. Rep. 1117.

**40. EQUITY—Pleading and Proof.**—Where a bill prayeth that a deed be set aside on the ground that its execution was procured by fraudulent representation of one of the defendants that it was simply a power of attorney, and the evidence shows that complainant had never executed the deed, and that her signature thereto was a forgery, the variance is fatal.—*Henry v. Suttle*, U. S. C. C. (N. J.), 42 Fed. Rep. 91.

**41. EQUITY JURISDICTION—Injunction.**—A court of chancery will not enjoin the commissioners of a drainage district from exercising jurisdiction over certain land on the ground that such land has not been legally annexed to the district, since the land-owner has an adequate remedy at law by *quo warranto*.—*Bozman v. Drainage Commissioners*, Ill., 24 N. E. Rep. 630.

**42. EQUITY PRACTICE—Decree.**—The recital of the evi-

dence being part of the decree, a certificate of the oral evidence may be signed by the chancellor at a term subsequent to the one at which the decree was rendered, when the motion that such certificate be signed was made at the time when decree was rendered, and was duly continued until granted, since the pendency of such motion serves to keep the decree open.—*Bennett v. Bradford*, Ill., 24 N. E. Rep. 629.

**43. EXECUTION SALE—Redemption.**—Under Rev. St. Ill. ch. 77, § 27, which authorizes the issuance of special executions on probated claims for the purpose of redemption from execution sales of the land of the deceased, where, after such redemption has been made, the original execution sale is set aside in equity, it is proper to restrain further proceeding under the special execution.—*Cohen v. Menard*, Ill., 24 N. E. Rep. 604.

**44. FRAUDS—Statute of—Pleading.**—In an action for the price of goods sold and delivered, it is not necessary that the complaint should show that the contract was not within the statute of frauds.—*McMenomy v. Talbot*, Cal., 23 Pac. Rep. 1069.

**45. FRAUDULENT CONVEYANCE.**—In an action by an assignee for the benefit of creditors to set aside an alleged fraudulent transfer of property made by the debtor about two weeks before the filing of the petition in insolvency, the debtor testified that when he made the transfer he did not know that he was owing more than he could pay, but that he did know that more money was due than he could have paid if his creditors had demanded immediate payment, and that he did not have money enough in his hands to pay his debts as they became due, but that he had merchandise: *Held*, that, under Civil Code Cal. § 3450, defining an "insolvent" as one who is unable to pay his debts from his own "means" as they become due, this was not such a distinct confession of insolvency as would warrant the supreme court in setting aside a finding that the debtor was solvent when the transfer was made.—*Sacry v. Lobre*, Cal., 23 Pac. Rep. 1058.

**46. GARNISHMENT—Fraud.**—The garnishee answered that defendants, being indebted to them, executed to them a chattel mortgage, under which they obtained possession and sold the goods, but that the amount realized was not sufficient to discharge their debt. Plaintiffs replied that the garnishees, by false representations, induced defendants to sign the mortgage without reading it, and that they did not know garnishees had power thereunder to take possession and sell: *Held*, that the reply was properly stricken out, since it did not deny that the mortgage was given to secure a valid debt, and therefore no injury was shown to have resulted from the alleged false representations.—*Goddard v. Guillar*, Iowa, 45 N. W. Rep. 729.

**47. GARNISHMENT—Wages.**—That a creditor transferred to his attorney a just debt, and caused attachment and garnishment to issue and be prosecuted in an adjoining State, thus coercing payment, though both parties were citizens of Georgia, and though the motive for proceeding elsewhere was to evade the laws of this State exempting the debtor's wages from process of garnishment, constitutes no cause of action in favor of the debtor against the creditor.—*Harwell v. Sharp*, Ga., 11 S. E. Rep. 561.

**48. HIGHWAYS—Town Records.**—In proceedings to enjoin a town from opening a street, it appeared that the record of the board of trustees failed to show that they accepted the report of the commissioners appointed to assess benefits and damages within twenty days from the filing of the same with the town clerk, as required by Rev. St. Ind. 1881, §§ 3370-3372: *Held*, parol evidence was inadmissible to show that the trustees had actually accepted the report within the time prescribed.—*Byer v. Town of New Castle*, Ind., 24 N. E. Rep. 578.

**49. HUSBAND AND WIFE.**—Where, at the time of the marriage, the wife contributed to the business, from her separate property all the stock and capital except a few goods put in by the husband, and the stock on

hand at his death is less than the amount of her original investment, it is her separate property.—*Walsh v. Walsh*, Cal., 23 Pac. Rep. 1099.

50. HUSBAND AND WIFE.—Family Expenses.—Under Code Iowa, § 2214, providing that the expenses of the family shall be chargeable on the property of both husband and wife, and that they may be sued jointly or separately therefor, in order to entitle a physician to recover against the wife for medical services rendered her at the husband's request, which are admitted to be a family expense, it is not necessary for him to prove that they were needful and proper for her, though he may have so alleged in his declaration.—*Schrader v. Hoover*, Iowa, 45 N. W. Rep. 734.

51. HUSBAND AND WIFE.—Tenancy in Common.—Under §§ 43, 44, ch. 45, Rev. St. 1866, being §§ 43, 44, ch. 45, Gen. St. 1878, upon a grant or devise to husband and wife, they take as tenants in common, unless expressly declared to be as joint tenants.—*Wilson v. Wilson*, Minn., 45 N. W. Rep. 710.

52. INJUNCTION—Contempt.—Upon the hearing of a motion for alimony, it appeared that the decree of divorce was based upon a contract of marriage signed by the parties; that the divorce suit was still pending, an appeal having been taken from the decree entered therein; that before the present proceedings defendant sued plaintiff in the circuit court of the United States, and a decree was entered in such suit declaring said marriage contract fraudulent and void, and an order was entered perpetually enjoining the plaintiff from alleging the validity of the contract, and from making any use of the same in evidence or otherwise to support any claim under it. Upon interposing this decree on the hearing of the motion, the defendant asked the court to compel the plaintiff to obey said injunction: *Held*, that it was error to refuse this request and enter a judgment for alimony.—*Sharon v. Sharon*, Cal., 23 Pac. Rep. 1101.

53. INJUNCTION—Violation.—A defendant, who, when enjoined from selling a certain cordial in certain bottles with a particular label, sells its entire stock of the cordial, bottles and labels to a third person, under an arrangement that he would fill such orders for the cordial as the defendant might receive, is guilty of a violation of the injunction, though the defendant did not share in the profit of filling such orders, and though it had received the advice of counsel that it might sell its stock in bulk without violating the injunction.—*Societe, etc. v. Western Distilling Co.*, U. S. C. C. (Mo.), 42 Fed. Rep. 96.

54. INSURANCE—Application.—Though an application for insurance recites that the solicitor acted as agent of the insured in writing out answers to questions in the application, and the policy contains a warranty that the diagram of the insured premises in the application is correct, the policy is not vitiated by the incorrectness of the diagram, if it was made by the solicitor.—*Spratt v. New Orleans Ins. Co.*, Ark., 13 S. W. Rep. 739.

55. INSURANCE—Conditions.—A condition in a policy of insurance that, in case any of the representations or statements in the application are untrue, the policy shall be null and void, does not make the policy absolutely void, but void only at the election of the insurer.—*Schreiber v. German American Hall Ins. Co.*, Minn., 45 N. W. Rep. 708.

56. INSURANCE COMPANIES—Agents.—In an indictment under § 292, ch. 34, Gen. St. 1878, as amended by ch. 54, Laws 1879, for acting as the agent of an insurance company not of this State, without the proper certificate of authority from the insurance commissioner, it is immaterial that the company had or had not complied with the statute.—*State v. Johnson*, Minn., 45 N. W. Rep. 711.

57. INTOXICATING LIQUORS—Ordinance.—The general ordinances of a city were revised and consolidated for publication in book form, and were thus adopted and re-enacted. An ordinance under which a prosecution

had been begun was re-enacted in substantially the same language, without any words of repeal, or any clause saving pending prosecutions: *Held*, that the effect of the re-enactment was to continue uninterruptedly in force the provisions of the original ordinance, and that the pending prosecution was not thereby abated or affected.—*City of Junction City v. Webb*, Kan., 23 Pac. Rep. 1073.

58. INTOXICATING LIQUORS—Druggist.—A druggist is liable criminally for unauthorized sales of liquor by his clerk, if the sales made by the clerk were made within the scope of the authority delegated to him by the druggist, or the authority which may fairly be presumed from the instructions of the druggist, or the course of dealing by him, with reference to such matters.—*United States v. White*, U. S. D. C. (Mich.), 42 Fed. Rep. 138.

59. JUDGMENT—Finding.—A judgment will not be reversed for the want of a finding on an issue with respect to which there was no evidence, where the effect of such a finding would simply be to invalidate the judgment.—*Himmelman v. Henry*, Cal., 23 Pac. Rep. 1098.

60. JUDGMENT—Res Adjudicata.—The pendency of an appeal from a decree does not keep it from being a bar to another suit on the same cause of action.—*Moore v. Williams*, Ill., 24 N. E. Rep. 619.

61. JUDGMENT AS EVIDENCE—Collateral Attack.—Where, in a suit brought by heirs for the partition of their ancestor's land, the petition alleges that the ancestor is dead, and that the petitioners are his heirs, a decree which finds that the allegations of the petition are true is, in a subsequent action for ejectment for the same land, *prima facie* evidence of such death and heirship.—*Benefeld v. Albert*, Ill., 24 N. E. Rep. 634.

62. LIENS—Bona Fide Purchasers.—The bona fide purchase of personal property, in payment of an antecedent debt, before the property was seized under a laborer's general lien, will prevail over such lien, no notice of the lien being brought home to the purchaser, although the written conveyance contemplated by the parties at the time of the purchase was not executed until after the levy.—*Forbes v. Chisholm*, Ga., 11 S. E. Rep. 554.

63. LIENS—Foreclosure.—Want of title in the defendant to the premises on which the lien is claimed, and alleged title in a third person who is no party to the suit, will not bar an action for foreclosing and enforcing the statutory lien of a material man.—*Ford v. Wilson*, Ga., 11 S. E. Rep. 559.

64. LIMITATION.—In suit to quiet title defendants by a cross-bill alleged that plaintiff held under a void will and asked that the probate be set aside: *Held*, that although the question raised affected the title to real estate, the cross-bill was primarily an action to set aside a will, and under Code Iowa, § 2529, was barred by the lapse of more than five years from the date of probate.—*Willard v. Wright*, Iowa, 45 N. W. Rep. 886.

65. LIMITATIONS—Malicious Prosecution.—In an action by a surviving partner, the complainant alleged that defendants maliciously prosecuted a claim against plaintiff's firm, knowing that it was fraudulent; that, to maliciously injure said firm, they caused an attachment to be levied on merchandise thereof; that the action resulted in a judgment for plaintiff: *Held*, that the main cause of action set out was the malicious prosecution, and that the determination of the action in plaintiff's favor, and not the levy of the attachment, which was a mere incident, fixed the date from which the statute ran against the present action.—*Berson v. Ewing*, Cal., 23 Pac. Rep. 1112.

66. LIMITATION OF ACTIONS—Contract.—An agreement, for a valuable consideration to support plaintiff, and furnish her a home during her life, is a continuing contract, and a refusal to support is a continuing breach thereof; and a suit brought more than five years after the refusal to support is not barred by limitation.—*McCoy v. McDowell*, Iowa, 45 N. W. Rep. 730.

**67. MARINE INSURANCE — Perils of River.** — A river steam boat ran upon a bar, and, upon being taken off, it was found that her seams had opened, and that she was leaking badly. To keep her from sinking, she was beached upon another bar. While there the river rose rapidly, and destroyed the vessel: *Held*, that she was lost by a peril of the river. — *The Natchez*, U. S. D. C. (La.), 42 Fed. Rep. 163.

**68. MASTER AND SERVANT — Negligence.** — Where the foreman of a mine tells a laborer to go and work in a certain room in the mine, of the condition of which the laborer knows nothing, and he does so, and is injured by the roof falling on him, the foreman is presumed to know of the condition of the roof, and his negligence in not telling the laborer about it is the negligence of the master. — *Consolidated Coal Co. v. Wonebacher*, Ill., 24 N. E. Rep. 627.

**69. MASTER AND SERVANT — Risk of Employment.** — A section man who had worked more than three months on the track of a railroad, when about one-third of the trains passing over the same were irregular or extra trains, not running on schedule time: *Held*, to be chargeable with notice of the practice to run such trains, and hence that he assumed the risk incident to the service from that cause. — *Larson v. St. Paul, etc. Ry. Co.*, Minn., 45 N. W. Rep. 722.

**70. MEASURE OF DAMAGES — Conversion.** — In a suit by legatees against a railroad company for the value of shares of its stock owned by the testator, it appeared that the executor had surrendered the stock to a committee of reorganization, and had taken therefor negotiable certificates, to be redeemed by a new issue of stock when the reorganization was effected. These certificates were transferred by the executor after his removal by the court from the trust, and after various transfers they were taken up by the company, and the new stock issued to the holders: *Held*, the railway company was liable for the value of the stock at the time of the new issue. — *Mobile, etc. Ry. Co. v. Humphries*, Miss., 7 South. Rep. 522.

**71. MECHANICS' LIENS — Coal Mines.** — A coal mine is an improvement on land, within the meaning of Code Ala. 1886, § 3018, giving a lien to every mechanic or other person doing work or furnishing material, fixtures, or machinery "for any building or improvement on land." — *Central Trust Co. v. Sheffield, etc. Ry. Co.*, U. S. C. C. (Ala.), 42 Fed. Rep. 106.

**72. MECHANIC'S LIENS — Description.** — Question as to the sufficiency of description of property in mechanic's lien action. — *Emerson v. Gainey*, Fla., 7 South. Rep. 527.

**73. MECHANICS' LIENS — Husband and Wife.** — A husband having contracted to have the plumbing done in a house being constructed by his wife, and owned by her, and the issue being whether he acted by her authority, so that her property might be charged with a lien, it was error to exclude proof that the wife saw and conversed about the plumbing while it was being done; the statute making her knowledge and consent evidence of her authority. — *McCarthy v. Caldwell*, Minn., 45 N. W. Rep. 723.

**74. MINES AND MINING.** — Where the strike of the vein passes perpendicularly through the end lines of the location, the fact that between the end lines the out crop is forced by the surface influences of slides and debris to meander so as to make slight variations from the general trend of the strike, does not prevent the side lines from being parallel with the vein; it being only necessary in such case that they shall be substantially parallel. — *Cheerman v. Hart*, U. S. C. C. (Colo.), 42 Fed. Rep. 98.

**75. MINES AND MINING.** — In action between two adjoining mine-owners to quiet title to a mining claim, where there is no dispute as to the surface boundaries, and each admits that the other is entitled to all veins, throughout their entire depth, having apexes within the vertical side lines of his claim, an allegation in the complaint that a vein known as the "Ralston No. 1" has its apex within the side lines of plaintiff's claim, and an

allegation in the answer that a vein known as the "West Bullion" has its apex within defendant's claim, do not raise any material issues, in the absence of an averment that these two veins are identical. — *Bulwer Con. Min. Co. v. Standard Con. Min. Co.*, Cal., 23 Pac. Rep. 1102.

**76. MORTGAGES — Actions.** — Code Civil Proc. Cal. § 726, which provides that "there can be but one action for the recovery of any debt secured by mortgage upon real estate or personal property," and that it shall be by foreclosure, is imperative, and a creditor holding a mortgage given as security must bring his action of foreclosure; and, though the security proves valueless, he cannot waive it, and bring an action on the debt. — *Barbier v. Ramelli*, Cal., 23 Pac. 1086.

**77. MORTGAGES — Assignment.** — An assignee of a bond and mortgage, holding under an assignment made by the assignor for the purpose of defrauding a subsequent purchaser of the securities, can, as against a subsequent purchaser for full value, derive no benefit from his assignment unless he is both innocent and ignorant of the fraud, and then only to the extent that he has parted with value on the strength of the assignment, and before notice of the fraud. — *Mellick v. Mellick*, N. J., 19 Atl. Rep. 570.

**78. MORTGAGES — Priority.** — On a bill for subrogation, it appeared that complainant agreed with the owner of land to redeem it under a foreclosed mortgage which had priority of all other liens, and also to pay off other judgments against it, and to receive an absolute deed, but to reconvey to the owner if he should repay the amount so paid, with interest. Defendant urged complainant to make this agreement, and to redeem the land, and represented that he had no claims against it, though in fact he had a mortgage, of which complainant had no actual notice, prior to all other liens save that of the first mortgage under which complainant redeemed: *Held*, defendant was estopped from setting up his mortgage against complainant, who was entitled to be subrogated to the priority of the foreclosed mortgage, under which he had redeemed. — *Bunting v. Gilmore*, Ind., 24 N. E. Rep. 583.

**79. MUNICIPAL CORPORATIONS — Contracts.** — Where the mayor and council of a town have the power to contract an annual indebtedness for lighting the town, they will not be enjoined, under Const. Ga. art. 7, § 7, providing that a debt cannot be incurred by a town without the approval of two-thirds of the voters, from carrying out a ten years' contract for lighting, by the terms of which \$2,000 is to be paid annually, so long as such payments are paid as they become due. — *Lott v. Mayor*, Ga., 11 S. E. Rep. 558.

**80. MUNICIPAL CORPORATIONS — Defective Sewers.** — In an action against a city for injuries to adjacent property caused by the overflow of a sewer which it has knowingly permitted to become obstructed and out of repair, it is no defense that the flow was unusual where it appears the sewer would have carried off all the water if it had been kept in repair. — *Spangler v. City and County of San Francisco*, Cal., 23 Pac. Rep. 1091.

**81. MUNICIPAL CORPORATIONS — Disorderly Houses.** — Pen. Code Tex. arts. 329, 341, prohibit houses of prostitution in the State. The special charter of the city of San Antonio confers on the city power "to suppress and restrain" disorderly houses and houses of prostitution, and authorizes the city council, by ordinance, to "restrain and punish" prostitutes, to "prevent and punish" the keeping of houses of prostitution, and to adopt summary measures for "the removal or suppression, or regulation and inspection, of all such establishments." By these and other sections, which also confer the power to regulate, the power to license other occupations is expressly conferred: *Held*, that the charter does not confer on the city power to license houses of prostitution. — *In re Garza*, Tex., 13 S. W. Rep. 779.

**82. MUNICIPAL CORPORATION — Ordinance.** — A person who rides on his bicycle across that part of the Kansas

river bridge that is used for the passage of street-cars, carriages, and other vehicles does not violate § 17 of the city ordinance, No. 861, of the city of Topeka, that reads as follows: "It shall be unlawful for any person to ride on any bicycle or velocipede upon any sidewalk in the city of Topeka, or across the Kansas river bridge. Any person violating this section shall, upon conviction thereof, be fined in a sum not less than one dollar, nor more than ten dollars, for each offense." — *Swift v. City of Topeka*, Kan., 23 Pac. Rep. 1075.

83. MUNICIPAL ORDINANCES — Passage. — A clause in the charter of the city of Minneapolis providing that no ordinance shall be passed at the same session at which it is introduced, except by the unanimous consent of all the members of the council present: *Held*, not to require a unanimous vote upon the final passage of the ordinance, but only unanimous consent that it be put to a vote for its passage. — *State v. Priester*, Minn., 45 N. W. Rep. 712.

84. NEGLIGENCE — Gas Company. — The fact that the ditch in which plaintiff was injured was dug by order of one of the directors of defendant company, and paid for by the treasurer, does not make the company responsible for its condition, when it does not appear that said director was authorized thereto by the board, and when his act had been repudiated, and the ditch partially filled, by the company, before the accident. — *Noblesville Gas & Imp. Co. v. Loehr*, Ind., 24 N. E. Rep. 579.

85. NEGOTIABLE INSTRUMENT — Gambling Debt. — In an action on a note, which it was admitted was given for a gambling debt, and void under the statute, unless defendant was estopped from setting up such defense against plaintiff, as assignee, there was evidence that at one time before the purchase of the note defendant told plaintiff that it was all right, and that he would pay it, but undisputed evidence showed that plaintiff knew what the note was given for before he purchased it, and there was no claim that he relied upon or was induced by defendant's statement when he purchased the note: *Held*, that there was no estoppel, and that a judgment in plaintiff's favor could not be sustained. — *Spray v. Burk*, Ind., 24 N. E. Rep. 589.

86. PARTNERSHIP — Action on Note. — In an action by a purchaser for value, before maturity, on a note purporting to have been executed by M & Son, where the partnership between defendants is denied, and M testifies that the note was executed without his knowledge, though it was shown that, at the time of its execution, he was holding himself out to the public as the partner of his son in business, plaintiff cannot recover without showing that he knew of such ostensible partnership. — *Hahlo v. Mayer*, Mo., 13 S. W. Rep. 804.

87. PARTNERSHIP — Conversion. — Where all the members of a partnership agree to change it into a corporation, and articles are drawn up transferring to it all the firm property, the fact that the articles are not recorded until after the death of one of the partners, and that the others thereafter, in good faith, conduct the business of the corporation, using the partnership assets, does not render them guilty of a conversion of the partnership property. — *McCarthy's Admr. v. Wood*, Ky., 13 S. W. Rep. 792.

88. PLEADING — Breach of Contract. — The complaint alleged that plaintiff's testator intrusted a certain monument to defendant to sell, and that "since the sale of said monument, and the receipt by defendant of the purchase price thereof, plaintiff, as such executrix, has demanded an accounting of said sale, and the payment to her of the purchase price of said monument, and defendant has refused, and still refuses, to account for or pay the same, or any part thereof." *Held*, that there was not an entire failure to state the fact of non-payment, but that the averment was simply uncertain and defective, and that this defect could be reached, not by general demurrer, but by special demurrer only. — *Grant v. Sheerin*, Cal., 23 Pac. Rep. 1094.

89. PRACTICE — Service by Publication. — In an action commenced against a non-resident defendant by publication of the summons, where judgment for want of

an answer is properly entered, except that the affidavit of publication is insufficient, if the summons was in fact duly published, and no facts appear to show that it would be unjust to the defendant, or would affect intervening rights of third persons, the court ought, under §§ 124, 125, ch. 66, Gen. St. 1878, to allow a proper affidavit of publication to be filed *nunc pro tunc*. — *Burr v. Seymour*, Minn., 45 N. W. Rep. 715.

90. PRINCIPAL AND AGENT — Payment. — An agent to whom money is paid for his principal by mistake is not liable to the party paying it if he has paid it over to the principal before notice of the mistake, and that he is required not to pay it over. — *Shepard v. Sherin*, Minn., 45 N. W. Rep. 718.

91. PUBLIC LAND — Timber Culture Claim. — One who enters land under the act of congress known as the "Timber Culture Act," and who has complied with its conditions, is, during the term required to perfect his right to a patent, the owner of hay made from the grass which he cuts on the land. — *Carner v. Chicago, etc. Ry. Co.*, Minn., 45 N. W. Rep. 718.

92. QUIETING TITLE — Pleading. — In an action to quiet title, an amendment of the complaint, by enlarging the boundaries of the land as originally described, cannot be prejudicial to a defendant which in its amended answer disclaims title to "any part" of the land described in the amended complaint. — *Bulwer Con. Min. Co. v. Standard Con. Min. Co.*, Cal., 23 Pac. Rep. 1109.

93. RAILROAD AND BONDS. — On a question as to the validity of certain bonds issued by a county to a railway company, it was claimed that the issue was not authorized by two-thirds of the qualified voters, as required by Const. Miss. art. 12, § 14, and that such fact would appear from an inspection of the registration lists. The board of supervisors, in the performance of their duties, had declared that two-thirds of the voters had voted for the measure: *Held*, that a purchaser was not required to go behind such returns, and one who purchased for value, without actual notice of the wrongfulness thereof, was entitled to recover. — *Madison County v. Brown*, Miss., 7 South. Rep. 516.

94. RAILROAD COMPANY — Negligence. — Where plaintiff's injury is caused by his negligence in going on defendant's railroad track in a public street, and by defendant's negligence in running its train faster than allowed by law, plaintiff cannot recover, unless defendant discovered plaintiff's peril, or might, by the use of ordinary care, have discovered it, and then neglected to use the means at his command to prevent the injury; and in such case recovery is granted, not on the ground that defendant's second act of negligence was the sole cause of the injury, but on the ground that defendant is estopped by its recklessness from asserting plaintiff's contributory negligence. — *Kelley v. Mo. Pac. Ry. Co.*, Mo., 13 S. W. Rep. 806.

95. RAILROAD COMPANY — Taxation. — A bridge built by a corporation organized for that purpose is not the property of a railway company, and assessable for taxes as such by the State board of railway commissioners, under Mansf. Dig. Ark. § 5647, though the stockholders of both companies are the same, and all of the bridge company stock is pledged to the railway company, which by contract has the permanent use of the bridge. — *St. Louis, etc. Ry. Co. v. Williams*, Ark., 13 S. W. Rep. 796.

96. REAL ESTATE AGENT — Commission. — A real estate broker, employed to find a purchaser of land at a designated price, under an agreement whereby the owner is to furnish a perfect abstract of title on a deposit of 10 per cent. of the price by the purchaser, has earned his commission when he produces a purchaser willing to buy on the prescribed terms; and where the owner afterwards induces his title to be rejected for the purpose of defeating the sale, the broker's return of the deposit, in compliance with the contract of sale, though without the owner's knowledge, does not affect his right to his commission. — *Phelps v. Prusch*, Cal., 23 Pac. Rep. 1111.

97. SALE — Stock. — Mining stock is personal property,

and its delivery is governed by Civil Code § 1745, providing that personal property shall be deliverable at the place where it is at the time of the sale, or agreement to sell, unless the seller has agreed to deliver it elsewhere, or an option for its delivery is provided for.—*Mattingly v. Roach*, Cal., 23 Pac. Rep. 1117.

98. SCHOOL LANDS.—Notes. — In an action on a note made by the trustee of a school township for the price of land purchased for the establishment of a graded school, under Rev. St. Ind. 1881, § 4446, authorizing the trustees of two or more school townships to establish joint graded schools and to acquire land for that purpose, the petition need not allege facts showing the necessity for such purchase, or for the school, as of that the trustees are, by the statute, the sole judges.—*Craig School Tp. v. Scott*, Ind., 24 N. E. Rep. 588.

99. SCHOOLS AND SCHOOL-DISTRICTS.—Under 2 Starr & C. St. Ill. ch. 122, § 83, which provides that, in school-districts, having a population of not less than 2,000 inhabitants, the schools shall be under the charge of a board of education, who shall have power to examine and employ teachers, and fix their salaries, a teacher in such district who has been examined and employed by the board is entitled to his salary though he has not received from the county superintendent a certificate of qualification, which is made by 2 Starr & C. St. Ill. ch. 122, § 53, a condition precedent to the receipt of salary in all schools under the control of school directors.—*Kuenster v. Board of Education*, Ill., 24 N. E. Rep. 659.

100. STATUTES—Construction. — Where, in a statute, words particularly designating specific acts or things are followed by and associated with words of general import comprehensively designating acts or things, the latter are generally to be regarded as comprehending only matters of the same kind or class as those particularly stated.—*State v. Walsh*, Minn., 45 N. W. Rep. 721.

101. TAXATION—Assessment. — Where the assessor made valuations in a memorandum book, and afterwards consulted with members of the equalizing board in regard thereto, and adopted suggestions of theirs in raising his valuations on the final assessment roll, and no notice of this was given to the owner, this was not an illegal raising of valuations by the board, nor a violation of § 6 of the Kissimmee City Act.—*Town of Kissimmee City v. Cannon*, Fla., 7 South. Rep. 522.

102. TAXATION—Assessment. — Where real property should be assessed and valued for taxes in separate lots or parcels, an assessment and valuation in blocks or several parcels in gross will not be set aside if the owner, by listing and valuing the property himself in that manner, consents to such mode of assessment and valuation. He is estopped to complain that it is illegal.—*Town of Kissimmee City v. Drought*, Fla., 7 South. Rep. 525.

103. TAX-SALE.—The legal title to certain lands was in one person, but two others were equitable owners of equal interests with him. One of the latter bought the lands at a tax-sale, and took the deed in his wife's name. Plaintiff, a judgment creditor of the legal owner, of his own motion redeemed the lands, and sued to recover from the other equitable owner the sum so expended: *Held*, that the wife took no title as against her husband's co-owners, and no promise could be implied to repay for the unnecessary redemption. —*Lindley v. Snell*, Iowa, 45 N. W. Rep. 726.

104. TAX-SALES—Levee Lands. — An auditor's deed of levee lands, given on proof that all taxes had been paid thereon up to date, exclusive of the time they were held by the levee board, conveyed an indefeasible title.—*Murdock v. Chafe*, Miss., 7 South. Rep. 519.

105. TRIAL—Conduct of Jury.— Upon trial of a claim against the estate of a decedent, the fact that the jury took the written claim with them into the jury-room, without the administrator's consent, is not reversible error.—*Avery v. Moore*, Ill., 24 N. E. Rep. 606.

106. TRUST.—Where the owner of real estate, and the

proposed purchaser at a judicial sale of such real estate, enter into a contract that the title, when acquired by such purchaser, shall be held in trust for the payment of the judgment and mortgage liens thereon, and when they are satisfied the remainder of such real estate, or the proceeds thereof, shall belong to, and be reconveyed to, the debtor, and, in pursuance of such contract, such proposed purchaser acquires the title at such sale, it will be sufficient, under § 8, ch. 32, Comp. St., to create a trust-estate. —*Carter v. Gibson*, Neb., 45 N. W. Rep. 634.

107. TRUSTS—Equity.—A trustee has a right, when his duty is involved in doubt, to ask and receive the aid and direction of a court of equity, to the extent his necessities may require, and the exigencies of the case demand. This aid should not be sought when the events which must control are uncertain, or when some other tribunal should properly pass upon the question, or where no real difficulty is presented for solution. The court should be called on to decide and direct, not to counsel and advise.—*Griggs v. Veghte*, N. J., 19 Atl. Rep. 867.

108. WIFE'S SEPARATE ESTATE—Estoppel. — The fact that a husband, in buying machinery with his wife's funds, which is thereafter affixed to her land, does not disclose his agency to the seller, does not estop the wife in a subsequent controversy with creditors of the husband other than the seller from asserting her ownership of the machinery. —*Arnold v. Elkins*, Miss., 7 South. Rep. 521.

109. WIFE'S SEPARATE ESTATE—Mortgage. — One who purchased a wife's separate real estate cannot plead the invalidity of a mortgage thereon, executed by herself and husband, without showing that the plea is for her benefit, or that he paid her full value without notice of the mortgage, or under an agreement that he should be permitted to set up its invalidity, the plea of coverture being a personal one.—*Johnson v. Jouchert*, Ind., 24 N. E. Rep. 580.

110. WILLS—Contingent Remainder. — Under a devise of land to testator's daughters for life, "and, after the death of either of them, their share to be equally divided amongst their children or their descendants," the heirs of a child of one of the daughters, which died during its mother's life, take no estate, since the remainder does not vest until the death of the daughter.—*Bates v. Gillett*, Ill., 24 N. E. Rep. 609.

111. WILLS—Devises.—A testator directed his executors to sell his real and personal estate, not otherwise particularly disposed of, whenever they should deem it best to do so; and by a subsequent clause gave all the residue of his estate, after certain specific bequests, to trustees for the benefit of his sons, the interest of their shares to be used for their maintenance, and the principal to be paid over on certain conditions when they attained the age of 25. While the executors were still administering, and before they had sold certain land, it was attached by a creditor of one of the sons for his interest therein. The executors and trustees intervened: *Held*, that defendant had no interest in the land, but only in the proceeds when paid to the trustees, and that the attachment should be dissolved. —*Wilkinson v. Severance*, Iowa, 45 N. W. Rep. 724.

112. WILLS—Lapse.—Under Rev. St. Ohio, § 5971, where a devise is made to I "for the term of his natural life, afterwards to his children in fee-simple," and I dies, and two of his children also die leaving issue in the life-time of testator, the issue of the deceased children of I take the share that their parents would have taken, had they survived testator.—*Woolley v. Paxton*, Ohio, 24 N. E. Rep. 599.

113. WITNESS—Impeachment. — The general rule is that when a witness makes statements on cross-examination collateral to the examination or issue, they are to be taken as conclusive, and it is not admissible to contradict him by showing the statements to be false.—*State v. Rieck*, Kan., 28 Pac. Rep. 1076.